UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RODNEY STEVEN SKINNER,

Petitioner,

-against-

GEORGE B. DUNCAN, ROBERT M. MORGENTHAU & ELIOT L. SPITZER,

Respondents.

01 Civ. 6656 (DAB) (AJP)

REPORT AND RECOMMENDATION

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ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Deborah A. Batts, United States District Judge:

Pro se petitioner Rodney Skinner seeks a writ of habeas corpus from his June 23, 1997 conviction in Supreme Court, New York County, of first degree assault, three counts of second degree criminal possession of a weapon, and fourth degree tampering with a witness, and sentence to twenty-five years to life imprisonment, reduced on appeal to seventeen years to life imprisonment. (Dkt. No. 1: Pet. ¶¶ 1-4, 9.) See People v. Skinner, 269 A.D.2d 202, 202-03, 704 N.Y.S.2d 18, 19-20 (1st Dep't 2000). Skinner's habeas petition alleges that: (1) he was arrested without probable cause and his coat and identifications were fruits of that unlawful arrest (Pet. ¶¶ 12(A)-(B)); (2) the prosecution failed to disclose a cooperation agreement with Skinner's co-defendant and withheld various police reports (Pet. ¶ 12(C)); (3) the joinder of the indictments against him subjected him

to Double Jeopardy (Pet. ¶ 12(D); (4) trial counsel Lynne Stewart was conflicted because she was facing indictment by the same District Attorney's Office that was prosecuting Skinner and she provided ineffective assistance in various ways (Pet. ¶ 12(E)); and (5) the use of a witness's grand jury testimony violated Skinner's Confrontation Clause rights (Dkt. No. 19: Traverse at 49-53).

For the reasons set forth below, Skinner's habeas petition should be DENIED.

FACTS

On January 31, 1996, Rodney Skinner, Anthony Wager and Anibal Rosa were arrested in connection with a confrontation with a rival drug gang, including Jehu Morales and Juan Rivera, on East 11th Street in Manhattan. (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 3-4; Pet. Ex. B: State 1st Dep't Br. at 2.) Skinner, Wager, Rosa, and an unidentified individual displayed weapons and demanded to see the dealers' bosses, who they believed were responsible for the murder of their friend Will Rodriguez earlier that day. (Skinner 1st Dep't Br. at 3-4; State 1st Dep't Br. at 1-2.) According to Morales, as the four men began to walk away, Wager, Rosa, and the other individual punched Morales and shot him in the legs. (Skinner 1st Dep't Br. at 4; see State 1st Dep't Br. at 2.) Skinner, Wager, and Rosa were arrested shortly after. (Skinner 1st Dep't Br. at 4; State 1st Dep't Br. at 2-3.)

Skinner, Rosa, and Wager were charged with first degree assault and three counts each of second and third degree criminal possession of a weapon. (Skinner 1st Dep't Br. at 4; State 1st Dep't Br. at 3.) Before trial, Wager pleaded guilty to third degree criminal possession of a weapon and was sentenced to one and one-third to four years imprisonment. (Skinner 1st Dep't Br. at 4; State 1st Dep't Br. at 3 n.1.) Rosa pleaded guilty to second degree criminal possession of a

weapon and was sentenced to one and one-half to four and one-half years imprisonment. (Skinner 1st Dep't Br. at 4-5; State 1st Dep't Br. at 3 n.1.)

Skinner's Arrest for Witness Tampering and Consolidation of the Indictments

On September 24, 1996, Skinner (who was out on bail for the shooting) was arrested for making threats to prosecution witnesses, including Juan Rivera, Dominic Rosado, and Jehu Morales. (Dkt. No. 1: Pet. Ex. B: State 1st Dep't Br. at 3-4; see Pet. Ex. A: Skinner 1st Dep't Br. at 4.) Indictment number 8190/96, which superceded 8151/96 (Dkt. No. 1: Pet. Ex. C: Miscellaneous Certificate No. 19451), charged Skinner with three counts of third degree intimidating a witness and one count of fourth degree tampering with a witness. (Skinner 1st Dep't Br. at 4; State 1st Dep't Br. at 4; see also Dkt. No. 19: Traverse Ex. F: 10/11/96 Arraignment Transcript ["Arr."] at 1-2; Traverse Ex. C: Indictment No. 8190/96.)

The State's motion to consolidate the two indictments was initially denied on November 14, 1996, before Skinner's co-defendants pleaded guilty. (Dkt. No. 8: 11/14/96 Justice Altman Decision.) After Rosa and Wager pleaded guilty, the State renewed its motion to consolidate the indictments, which was granted in a written decision dated January 23, 1997. (Dkt. No. 8: 1/23/97 Justice Altman Decision.)

Pre-trial Suppression Hearing

Skinner moved to suppress his black jacket and the line-up identifications of him on the ground that his arrest was not supported by probable cause, and a Dunaway/Mapp/Wade hearing

was held on January 24 through January 27, 1997. (Suppression Hearing Transcript ["H."] at 1-3, 278, 288.)[1/]

On January 31, 1996 at 1:00 a.m., Officer Maiorano and Sergeant Kelly were in a police car at Avenue B and East 12th Street when an individual ran up to the car and stated that "his friend was just shot." (Maiorano: H. 4-5, 11-12.) The officers drove to the scene with the individual and found a man who apparently had been shot, lying on ground, his legs bleeding. (Maiorano: H. 5-6, 13.) "[T]wo or three males" at the scene told the officers that "there were approximately five to ten male Hispanics involved in this" incident. (Maiorano: H. 6-7, 14.) One male, "wearing a green puffy jacket," was six-foot-two and either Black or Hispanic, in his early twenties. (Maiorano: H. 7.) The witnesses stated that two other males were with him, both wearing black jackets, one leather and the other "puffy." (Maiorano: H. 7.) The witnesses also said that the perpetrators "had guns." (Maiorano: H. 9.) Sergeant Kelly broadcast a description of the perpetrators provided by the man who stopped the police car (Kelly: H. 122; see also Maiorano: H. 7, 10, 16-18), as follows: "between five and ten male Blacks and Hispanics, one was around six foot. . . . [and] had a green jacket on and . . . another male that had a black jacket and . . . a black leather hat. They fled on foot east on 11th Street . . . between Avenue B and C." (Kelly: H. 118; see also Adams: H. 41-42, 70; Hernandez: H. 82-83.)[2/]

[1/] The second portion of the hearing addressed the propriety of the photo arrays and line-up procedures under Wade. The State called six witnesses, including three detectives and two investigators for the District Attorney's Office. (See generally H. 100, 125-257). At the conclusion of the hearing, the Court found that neither the photo arrays nor the line-up procedures were unduly suggestive. (H. 298-99.)

[2/] At Skinner's counsel's request, a recording of this radio transmission was admitted into (continued...)

Lieutenant Hernandez was at a different homicide scene about "four blocks south and two avenues east" of the shooting when he heard a radio transmission that someone had been shot in the legs and the possible perpetrators, "approximately 10 male Hispanics/Blacks," were fleeing eastbound from 11th Street and Avenue C. (Hernandez: H. 22-24.) According to Lt. Hernandez, the radio transmission stated that a six-foot-two, Black or Hispanic male was wearing a "green puffy jacket" and the others had "dark clothing, dark jackets." (Hernandez: H. 24.) Lt. Hernandez and his driver Officer Adams observed a group of three or four males "jogging through the walkway between the FDR Drive and Avenue D, going south approaching 6th Street." (Hernandez: H. 25-26, 80-81; Adams: H. 42-43.) Upon following the group to investigate further, Lt. Hernandez "noticed the tall male with a green [goose down] jacket in the company of two other males," who were wearing "black coats." (Hernandez: H. 26-28.) When the officers approached the male in the green jacket, he ran away and two officers pursued him. (Hernandez: H. 29.) Officer Adams observed the fleeing male place something about six inches long in a garbage can (Adams: H. 44, 47, 71, 76), from which Officer Gorman later recovered a loaded .9 millimeter pistol. (Gorman: H. 95-96; see also Hernandez: H. 32-33, 90). Officer Adams testified that the individual in the green puffy jacket was co-defendant Anthony Wager. (Adams: H. 48.)

Officer Adams held at gunpoint the two men in black coats, who Lt. Hernandez and Officer Adams both testified were Skinner and co-defendant Anibal Rosa. (Hernandez: H. 30, 86; Adams: H. 44-45.) As Officer Adams approached, Rosa stated that he had a gun in his left coat

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2/ (...continued)
evidence at the hearing and played during Sergeant Kelly's hearing testimony. (H. 19; Kelly: H. 120.)

pocket; Officer Adams recovered a .38 revolver from him. (Adams: H. 45-46, 72-73; Hernandez: H. 30-31, 33, 88.) Lt. Hernandez handcuffed Skinner, who "gave [him] a little resistance," while Officer Adams handcuffed Rosa. (Hernandez: H. 31, 89; Gorman: H. 95.)

The defense did not call any witnesses at the hearing. (H. 257, 279.) Defense counsel Lynne Stewart argued that there was not a sufficient description of Skinner for the officers to have had probable cause to arrest him, and thus his jacket and subsequent identification should be suppressed. (H. 258-61.)

The Court denied Skinner's motions to suppress on February 5, 1996, ruling from the bench that the police had probable cause to arrest Skinner. (H. 288-97.) The court found that while Skinner argued that a description of a "'male black or male Hispanic in a black jacket'" does not provide probable cause to arrest, Skinner had "ignore[d] the amplifying details which accompanied that description." (H. 295-96.) Specifically, the court found that

> Defendant [Skinner] was, in fact, apprehended along with two other male Hispanics, one of whom was wearing a black jacket as indicated in the description, and the other male who matched the most detailed description, that is, a male black or Hispanic, approximately 6'2 wearing a green puffy jacket.
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> These descriptions were given to the police officers a very short time after the crime had occurred, they were immediately relayed to the apprehending officers who were a very short distance away and the apprehending officers spotted the suspects immediately after they had listened to the descriptions.
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> Furthermore, the fact that the man in the puffy green jacket threw an object onto a garbage can immediately upon seeing the police officers and immediately before fleeing, (an object which was subsequently discovered to be a gun), and the fact that the individual in the black jacket who was with the defendant immediately told the officers quote, "I have [a] gun," close quote, and that gun was recovered from that defendant, this gave the officers probable cause to arrest [Skinner].

(H. 295-97.)[3/]

Skinner's Trial

The Prosecution Case

The State's witnesses included various police officers, detectives, and investigators, the shooting victim, Jehu Morales, and several eyewitnesses, including Juan Rivera and Dominick Rosado. (See Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 14-25; Pet. Ex. B: State 1st Dep't Br. at 6-19.) Juan Rivera testified at trial that Skinner put a .9 millimeter gun to his head. (Rivera: Tr. 120, 159.) Rivera told the grand jury that Wager shot Jehu Morales, but at trial he said that Wager had a gun but did not shoot Morales. (Rivera: Tr. 223-25.) "According to Jehu Morales, [Skinner] approached with Anthony Wager and Anibal Rosa, pulled out a 9 millimeter gun and was walking around pointing it at various people." (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 18, citing Morales: Tr. 831-32.) Wager asked who was selling "Dead Presidents" brand heroin, Morales said he was, and Wager told Morales to tell his bosses that they were going to get it for killing his friend. (Morales: Tr. 829, 830, 833.) After a scuffle, Morales was shot in the leg. (Morales: Tr. 833-35.) Morales testified that the person who shot him was "[l]ight skin[ned] with . . . a goose [down] coat with purple and black," with no facial hair, no sunglasses, and no hat. (Morales: Tr. 922-23, 943.)

[3/] When Skinner's counsel Stewart pointed out that there were only two men described in Sergeant Kelly's radio description, "one in the green jacket and one male wearing a black leather coat and a black leather hat . . . [and] no mention of any other male in a black jacket" (H. 300-01), the judge agreed that "in fairness to this record . . . it may well be that the radio broadcasts were limited to the two descriptions." (H. 301-302). Nevertheless, the judge found that "as a matter of law, [he] would not find that that variation in the testimony would change the conclusion of law that this Court would reach with regard to the totality of the other circumstances." (H. 302.)

Morales stated that right before he was shot, Skinner "was walking around with the gun pointing it at all of us." (Morales: Tr. 944.)

Rosado's grand jury testimony was read into evidence (Rosado: Tr. 754-59), following a Sirois[4/] hearing outside the jury's presence, at which Rosado stated that he would rather be jailed for contempt than testify at Skinner's trial because he believed that testifying would threaten his and his family's safety. (Rosado: Tr. 353; see generally Rosado: Tr. 340-53; see also Connelly: Tr. 755-59 (Rosado told D.A.'s investigator Connelly that he would not testify for fear he would be killed by Skinner or his associates).) The court determined that "since the unavailability of this witness to testify at trial was procured by the misconduct of the defendant," the court would permit the State to read into evidence Rosado's grand jury testimony. (Tr. 364-65.)

Rosado's grand jury testimony identified Skinner's picture as the person who put a gun to Juan Rivera's neck while one of Skinner's companions shot Jehu Morales. (Rosado: Tr. 766-62, 775.) Rosado's second grand jury testimony, also read to the jury, stated that after his first grand jury testimony, he saw Skinner in the street. (Rosado: Tr. 776.) Rosado testified that Skinner told him that there were some people testifying against Skinner and when he finds out who they are, he is "going to blast them," going to "waste anybody that's going to testify against him when he finds out," holding his fingers to simulate shooting a gun. (Rosado: Tr. 777-79.)

Detective Fiorica, a police ballistics expert (Fiorica: Tr. 468-71), testified that the shell casing and the bullet that hit Morales were not fired from the .9 millimeter gun that was found in the garbage can and believed to be Wager's, and could not have been fired from the .38 revolver

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[4/] See Point V below.

found on Rosa. (Fiorica: Tr. 476-77.) Detective Fiorica concluded that the shell casing and the bullet that hit Morales came from two different weapons, neither of which was recovered. (Fiorica: Tr. 476-77, 481-82.) In other words, there were at least four firearms at the scene of the shooting. (Fiorica: Tr. 483.)

The Defense Case

Skinner's defense was alibi. (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 26.) Skinner testified that he was innocent of the crimes charges and had not tried to intimidate any witness. (Skinner: Tr. 1274-75, 1349, 1353-54.) Skinner testified that he was at his mother's birthday party at the time of the shooting, starting at about 11:30 p.m., and that he called Anna Rivera before leaving "[a] little before 1" a.m. from his mother's phone (Skinner: Tr. 1304-06, 1370.) Skinner testified that after 1 a.m., he left the party and met Anna Rivera outside her building, located behind his mother's building. (Skinner: Tr. 1307.) As they were walking to the parking lot, "two young men came running towards [him.] Well, actually they were walking." (Skinner: Tr. 1308.) Then, "in a matter of seconds a bunch of cops just came out of nowhere, [said] freeze, [and had] their guns out." (Skinner Tr. 1308.) Lt. Hernandez searched, handcuffed, and took Skinner to the precinct. (Skinner Tr. 1308-10, 1315-16.)

When the State confronted Skinner on cross-examination with the fact that no call was made from Skinner's mother's phone to Anna Rivera's phone after 7:46 p.m. that evening, Skinner stated that he used a cellular phone. (Skinner: Tr. 1375-76.) When the State pointed out that credit records showed his cellular phone had been turned off in 1994, Skinner said he used a "cloned" phone that "a guy in the neighborhood" turned on for him. (Skinner: Tr. 1377-79, 1394-96.)

Skinner's mother, Kay Skinner, his aunt, Evelyn Taylor, and a family friend, Eddie Rosario, testified that Skinner was at his mother's birthday party between 11:00 p.m. and 1:00 a.m. on the night of the shooting. (K. Skinner: Tr. 985-98;[5/] Taylor: Tr. 1105-10; Rosario: Tr. 1130-32.) Luis Guzman, Ralph Hittman and Robert Caballero testified to Skinner's reputation for peacefulness and honestly, but conceded that they did not have knowledge of Skinner's complete criminal record. (Guzman: Tr. 1044-59; Hittman: Tr. 1337-43; Caballero: Tr. 1502-12.) The parties stipulated that had Betty White been called, she would have testified that "she was aware of Rodney Skinner's reputation for nonviolence and peacefulness" within the school community on the lower east side of Manhattan. (Tr. 1611-14.)

To rebut Skinner's character evidence, the State called Anibal Rosa's sister Brenda Rosa, and mother Manerva Rosa, who both testified that Skinner had a reputation for violence. (B. Rosa: Tr. 1557-62, 1568; M. Rosa: Tr. 1574-81.) Brenda Rosa denied that her testimony would help her brother, Skinner's co-defendant, because "[t]he plea that he copped" already included agreement that he would be sentenced to one and one-half to four and one-half years. (B. Rosa: Tr. 1564.)

Verdict and Sentencing

On February 21, 1997, the jury found Skinner guilty of first degree assault, three counts of second degree criminal possession of a weapon, and fourth degree tampering with a witness. (Tr. 1830-37.) Skinner was found not guilty of the third degree weapon possession and

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[5/] The prosecution's cross-examination of Kay Skinner established that she had provided alibi testimony for Skinner in three previous cases in which he was convicted. (K. Skinner: Tr. 1001-11; see also Skinner: Tr. 1355-65.)

witness intimidation charges. (Tr. 1831-37.) See also People v. Skinner, 269 A.D.2d 202, 202, 704 N.Y.S.2d 18, 19 (1st Dep't 2000).

On June 23, 1997, Skinner was adjudicated a persistent felony offender (Sentencing Transcript ["S."] at 7, 11, 13-14) and sentenced to four concurrent terms of twenty-five years to life, and a concurrent one year term. (S. 46-48; see Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 5.) See also People v. Skinner, 269 A.D.2d 202, 202-03, 704 N.Y.S.2d 18, 19-20 (1st Dep't 2000).

Skinner's March 1997 Motions to Set Aside the Verdict

On March 21, 1997, represented by counsel, Skinner moved under C.P.L. § 330 to have the verdicts set aside on the grounds that the jury reached inconsistent or repugnant verdicts and that a juror did not sufficiently support or announce the verdicts. (See Dkt. No. 15: State Br. at 7; Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 32-33.) The Court denied the motions on the record at Skinner's June 23, 1997 sentencing. (S. 2-3.)

Also on March 21, 1997, Skinner submitted a pro se motion to set aside the verdict, arguing that the indictments were improperly joined because Indictment 8190/96 had previously been dismissed. (Dkt. No. 16: Asst. Atty. General Laurie M. Israel Affidavit Ex. A: Skinner Pro Se 3/21/97 Motion to Set Aside Verdict at 2a-3a.) At sentencing, after the court ruled on the issues in the counseled C.P.L. § 330 motion, Skinner's counsel informed the court that Skinner wanted "to further amend his motion to set aside with regard to whether or not . . . the second indictment in the case [8190/96] . . . had been properly superceded." (S. 9.) The court foreclosed counsel from discussing that issue because all § 330 motions had already been decided. (S. 9.)

Skinner's July 1997 C.P.L. § 440 Motion

On July 12, 1997, Skinner brought a pro se C.P.L. § 440 motion in the trial court. (Dkt. No. 1: Pet. Ex. C: Skinner 7/12/97 C.P.L. § 440 Motion & Addendum.) The motion essentially repeated Skinner's pro se March 1997 C.P.L. § 330 motion asserting that Indictment 8190/96 had been dismissed. (Id.) Skinner argued that: "Indictment # 8190/96 was improperly joined to Trial Proceedings in contravention to § 160.50 of the C.P.L., in that said Indictment was previously sealed and dismissed in favor of the Defendant . . . " (Id., Skinner 7/12/97 C.P.L. § 440 Aff. ¶ 5.) Skinner "assert[ed] an abuse of Judicial Authority, whereas said Indictments were improperly joinable, in contravention to New York State Criminal Procedure Law: Sections § 200.20 and § 200.40, and Defendant['s] Due Process Entitlements under New York State and United States Constitutions regarding Double-Jeopardy." (Id., Skinner 7/12/97 C.P.L. § 440 Notice of Motion ¶ 1.)

In an addendum to this motion, Skinner alleged, inter alia, that: (1) Skinner's trial counsel Lynne Stewart's opening statement compelled Skinner to testify; (2) several detectives gave contradictory testimony; (3) Stewart refused to call Detective Pagan; (4) Skinner's alibi did not require his testimony nor his mother's; (5) Stewart failed to filed an omnibus motion under Indictment #8190/96; (6) exhibits to Skinner's § 330.30 and § 440.30 motions "clearly state indictment #8190/96 was dismissed and sealed [on] October 11, 1996 and October 15, 1996." (Pet. Ex. D: Skinner 7/12/97 C.P.L. § 440 Motion Addendum at 1-B, 2-B.)

In an order entered on September 22, 1997, the trial court denied the motion without opinion. (Dkt. No. 16: Israel Aff. Ex. C: 9/22/97 Order.) By order dated February 25, 1998, the First Department granted Skinner leave to appeal the denial of his C.P.L. § 440 motion, and consolidated

that appeal with his direct appeal. (Israel Aff. Ex. G: 2/25/98 1st Dep't Order.) See People v. Skinner, 1998 N.Y. App. Div. LEXIS 2802 (1st Dep't Mar. 3, 1998).

Skinner's March 1999 C.P.L. § 440 Motion

Skinner brought a second C.P.L. § 440 motion on March 30, 1999, raising five claims, including ineffective assistance of trial counsel. (Dkt. No. 16: Israel Aff. Ex. M: Skinner 3/30/99 C.P.L. Motion entitled "Supplemental Appeal Brief"; see also id. Ex. N: Skinner Addendum.) Skinner claimed, inter alia, that counsel Stewart failed to file an omnibus motion, failed to alert Skinner that she faced a criminal contempt charge in another case, failed to appear at his arraignment, failed to cross-examine Detective Wigdor, and failed to call Skinner's girlfriend Anna Rivera as a witness at trial. (Id.) The State "cannot locate a copy of the court's decision on this motion, [and presumes] it must have been denied." (Dkt. No. 15: State Br. at 14 n.13.)

Skinner's Direct Appeal

On appeal to the First Department in August 1999, Skinner's appointed appellate counsel[6/] argued that: (1) the trial court erred in denying Skinner's for-cause challenge to a prospective juror (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 43-47); (2) there was insufficient evidence of first-degree assault (id. at 48-52); (3) the introduction at trial of Rosado's grand jury testimony violated Skinner's Due Process and Confrontation Clause rights (id. at 52-57); (4) two counts of the criminal possession of a weapon indictment were "duplicitous" in violation of Skinner's Due Process rights because they failed to specify the weapon Skinner allegedly possessed (id. at 57-59); (5) the trial judge erred in charging the jury and responding to one of its requests (id. at 59-63);

6/ On direct appeal, Skinner was represented by Abigail Everett from the Center for Appellate Litigation. (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br.)

(6) Skinner's twenty-five year to life sentence was excessive under the circumstances (id. at 64-68); and (7) the trial court violated Skinner's Due Process rights by summarily denying his July 1997 C.P.L. § 440 motion (id. at 68-70). (See also Israel Aff. Ex. O: Skinner 1st Dep't Reply Br.)

On February 10, 2000, the First Department affirmed Skinner's conviction, but reduced his sentence to "four concurrent terms of 17 years to life concurrent with a term of 1 year." People v. Skinner, 269 A.D.2d 202, 202-03, 704 N.Y.S.2d 18, 19-20 (1st Dep't 2000). The First Department's decision reads as follows:

> Defendant failed to preserve his claim that his assault conviction was supported by insufficient evidence of intent to cause serious physical injury, and we decline to review it in the interest of justice. Were we to review this claim, we would find that the evidence amply demonstrated that he shared a community of purpose with his codefendants in shooting the victim. Ambiguous testimony cited by defendant does not establish abandonment of the intent to inflict serious physical injury, and defendant's flight with his codefendants provided further evidence of community of purpose.
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> The court properly exercised its discretion in denying defendant's challenge for cause, since the record establishes that the prospective juror in question never suggested any inability to be fair and impartial.
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> The court properly exercised its discretion in admitting the Grand Jury testimony of an eyewitness, since the People proved by clear and convincing evidence, following a hearing, that the witness's unavailability at trial was caused by threats made by defendant. The court properly exercised its discretion in declining defendant's request that it attempt to compel the witness to testify, since the witness had already testified that he was aware of his legal obligation to testify but that his fear was so intense that he would rather go to jail.
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> Since there was no repugnancy in the jury's verdict, the court properly refused to resubmit the case to the jury.
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> We find the sentence excessive to the extent indicated [i.e., reduced from 25 years to life, to seventeen years to life].
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> Defendant's motion to vacate judgment was properly denied (see, CPL 440.30 [4][d]).

> Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would reject them.

People v. Skinner, 269 A.D.2d at 202-03, 704 N.Y.S.2d at 19-20 (citations omitted).

On June 19, 2000, the New York Court of Appeals denied leave to appeal. People v. Skinner, 95 N.Y.2d 838, 713 N.Y.S.2d 145 (2000).

Skinner's Coram Nobis Petition to the First Department

Skinner filed a coram nobis petition in the First Department in March 2000, alleging various shortcomings of his appellate counsel, including inadequately arguing the points she raised and failing to raise other arguments, such as trial counsel's ineffectiveness, lack of probable cause for his arrest, and Brady and Rosario violations. (Dkt. No. 19: Traverse Ex. Z-1: Skinner 3/16/00 Coram Nobis Motion; see also Dkt. No. 16: Israel Aff. Ex. T: Skinner 9/13/00 Reply Coram Nobis Letter.)

On June 15, 2000, the First Department denied Skinner's coram nobis petition without opinion. People v. Skinner, 273 A.D.2d 950, 714 N.Y.S.2d 626 (1st Dep't 2000). The New York Court of Appeals denied leave to appeal on October 26, 2000. People v. Skinner, 95 N.Y.2d 908, 716 N.Y.S.2d 629 (2000).

Skinner's State Habeas Corpus Petition

On July 25, 2000, Skinner filed a pro se petition for a writ of habeas corpus in the Third Department, alleging that his conviction was illegally obtained because indictment number 8190/96 had been dismissed before it was consolidated for trial with indictment number 4378/96. (Dkt. No. 1: Pet. Ex. H: Skinner 7/25/00 3d Dep't Habeas Petition.) The Third Department sua sponte denied the petition on November 9, 2000. (See Pet. Ex. O: 11/9/00 3d Dep't Order.) The

New York Court of Appeals denied leave to appeal on January 16, 2001. People ex rel. Skinner v. Duncan, 96 N.Y.2d 703, 722 N.Y.S.2d 795 (2001), and denied Skinner's reargument motion on March 22, 2001, People ex rel. Skinner v. Duncan, 96 N.Y.2d 793, 725 N.Y.S.2d 642 (2001).

Skinner's 2001-2002 C.P.L. § 440 Motions

In a C.P.L. § 440 motion dated July 12, 2001, Skinner alleged, inter alia, that the prosecution violated Brady v. Maryland by failing to disclose that his co-defendant Rosa had a cooperation agreement with the District Attorney's office, and that Rosa had named Jehu Morales' shooter as someone other than Skinner. (Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Br.).[7/] Skinner enclosed in this motion a transcript of Rosa's testimony in People v. Rodriguez, et al., indictment number 3790/97. (Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Motion Ex. Q.) Skinner also argued that trial counsel Stewart was ineffective for various reasons, and that Stewart's "failure to advise defendant and defendant's family of her legal problems, and indictment was a Conflict of Interest." (Skinner 7/12/01 C.P.L. § 440 Br. at 40.)

In April 2001, Skinner filed a pro se motion to disqualify the trial judge (Justice Wetzel) from further proceedings in his case and for other relief. (Dkt. No. 17: Skinner 4/15/01 "Judicial Disqualification Motion.") On September 11, 2001, Skinner filed an "Addendum" to his "Judicial Disqualification Motion." (Dkt. No. 17: Skinner 9/11/01 Addendum to Judicial Disqualification Motion.)

7/ The State makes no mention of this § 440 motion in its opposition to Skinner's federal habeas petition and in fact argues that Skinner failed to exhaust his Brady claim because he only raised it in his coram nobis petition.

On January 3, 2002, Skinner's new retained counsel, Paul Dalnoky, filed a C.P.L. § 440 motion for Skinner, arguing that "reversal is required due to a per se conflict [by trial defense counsel Stewart] and the court's failure to conduct an inquiry." (See Dkt. No. 17: Skinner 2/26/02 Addendum to C.P.L. § 440 Motion, Ex. D at 6.) Specifically, "[w]hile it is understandable that defendant and his family were not aware of the criminal charges pending against Ms. Stewart, this Court and ADA Gagan are both presumed to have had knowledge of the fact that Ms. Stewart had been indicted and had been fighting the charges for several years. It was incumbent upon the Court to put the defendant on notice and obtain a waiver. Failure to do so requires automatic reversal." (Id. at 7-8.) After a January 7, 2002 appearance before Justice Wetzel in which he required Dalnoky to certify what in the current C.P.L. § 440 motion was "new" and what was "redundant" of prior motions (see Dkt. No. 19: Traverse Ex. Z: 1/7/02 Hearing Transcript at 2-3), Dalnoky withdrew from representing Skinner.

On February 26, 2002 Skinner filed another pro se "addendum" to his C.P.L. § 440 motion, alleging that his "due process rights were violated as a result of prosecutorial misconduct, and ineffective assistance of counsel." (Dkt. No. 17: Skinner 2/26/02 Addendum to C.P.L. § 440 Motion.) Skinner again accused the prosecution of Brady violations. (Id. at 5.)

The trial court's decision on May 16, 2002 addressed Skinner's myriad pending motions:

> Virtually from the moment of his conviction in 1997 until the present, [Skinner] has deluged this court, as well as the federal court, law enforcement agencies, and local and state government agencies with an onslaught of motions, requests for information, and letters accusing various individuals of being part of a grand conspiracy to frame him. This motion, which seeks judicial disqualification, vacatur of judgment, as well as the sun, the moon, and the stars, is the latest offering.

Initially, this motion was brought on the defendant's behalf by an attorney, Mr. Paul B. Dalnoky. At oral argument on this motion on January 7, 2002, I directed Mr. Dalnoky to swear that he had read every previous motion filed by this defendant, then to identify to the court precisely what, if any, new issues were contained in the instant motion. Mr. Dalnoky requested an adjournment to review the numerous boxes of previous motion papers, and to respond to my inquiry.

Several weeks later, Mr. Dalnoky submitted a motion to be relieved from the case, accompanied by several letters which the defendant sent to Mr. Dalnoky after January 7, 2002. In sum and substance, those letters criticize Mr. Dalnoky's professional appearance and conduct, and indicate that defendant no longer wished Mr. Dalnoky to represent him. Some might even interpret the defendant's letters as a thinly-veiled threat to Mr. Dalnoky's personal safety. I granted Mr. Dalnoky's motion to withdraw. [fn. omitted.]

On April 30, 2002, I sent a letter to the defendant advising him that Mr. Dalnoky had requested to be relieved, and that I had granted that request. I further advised the defendant to tell me, once and for all, whether all of his complaints were gathered together in the instant motion, so that the curtain could finally fall on five years of post-judgment motions. In response, another packet of materials dated May 6, 2002, arrived, which added nothing new or substantive to the previously-filed motion.

After an exhaustive (and exhausting) review of this motion, I conclude that the sole new issue raised is the claim that defendant's trial counsel, Lynne Stewart, was ineffective because she allegedly failed to file the proper pre-trial motions. While such a claim could have been raised on his direct appeal, see CPL § 440.10(2)(c), this Court will nonetheless address it. In support of this claim, the defendant attaches a transcript of colloquy between Judge Herbert Altman and Ms. Stewart, in which Judge Altman comments upon Ms. Stewart's lack of punctuality in filing her motions. While this may be interesting for its "Day in the Life of the Court" quality, the inference which the defendant would like to draw from this transcript is vitiated by what actually happened in the case.

A review of the relevant court files shows that the defendant was initially indicted for assault under indictment number 4378/96. Indictment number 8190/96 followed, charging the defendant with Intimidation of a Witness and Tampering With a Witness. The court records show that the defendant, through his attorney, filed an omnibus pre-trial motion in connection with 4378/96 requesting discovery and pre-trial hearings, including Huntley/Dunaway and Wade hearings. The People moved for consolidation of the two indictments. The defendant's attorney made the appropriate motion opposing the consolidation. Ultimately, Judge Altman granted the People's consolidation motion and denied the defendant's motions for pre-trial hearings as to Indictment No. 4378/96. The issue of pre-trial hearings [was] irrelevant to indictment number 8190/96 because the People did not serve notice as to any statements, identifications, or recovered property. Only felony

> grand jury notice was served as to 8190/96 pursuant to CPL § 190.50(5)(a). Parenthetically, it should be noted that the defendant, through his attorney, did challenge that indictment, claiming a violation of his right, upon written notice, to testify before the Grand Jury. Judge Altman found that claim meritless on November 14, 1996. [fn. omitted.]
>
> In view of the documented fact that appropriate pre-trial motions were filed on the defendant's behalf, his latest claim of ineffective assistance of counsel is groundless, and affords no basis for relief. In addition, the defendant has not met his burden of showing what motions that should have been made were not made, and that had they been made, would have made a difference.
>
> His remaining contentions are simply a rehash of previously filed, decided, and in many cases already-appealed motions. Accordingly, the defendant's instant motion is in all respects denied pursuant to CPL §§ 440.10(2)(a),(c), and 3(b)(c).

(Dkt. No. 8: 5/16/02 Justice Wetzel Decision.)

By order entered on August 29, 2002, the First Department denied Skinner's application for leave to appeal Justice Wetzel's May 16, 2002 order. (Dkt. No. 16: Israel Aff. Ex. Z: 8/29/02 1st Dep't Order.)

Skinner's Federal Habeas Petition

Skinner's timely-filed pro se habeas corpus petition argues that: (1) the police lacked probable cause to arrest him and his coat and identifications were fruits of that unlawful arrest (Dkt. No. 1: Pet. ¶¶ 12(A)-(B)); (2) in violation of Brady v. Maryland, the prosecution failed to disclose a cooperation agreement with Skinner's co-defendant and withheld various police reports (Pet. ¶ 12(C)); (3) the indictments against him were improperly joined in violation of his rights against Double Jeopardy after indictment number 8190/06 was dismissed (Pet. ¶ 12(D)); (4) trial counsel was conflicted by facing indictment by the same office as Skinner and provided ineffective assistance by failing to call several witnesses at trial, failing to appear on the day of his arraignment on the witness tampering charges, and failing to file an omnibus motion for these charges (Pet. ¶ 12(E));

and (5) the use of Dominick Rosado's grand jury testimony at trial violated Skinner's Confrontation Clause rights (Dkt. No.19: Traverse at 49-53).

ANALYSIS

I. THE AEDPA REVIEW STANDARD[8/]

8/ For additional decisions authored by this Judge discussing the AEDPA review standard in language substantially similar to that in this entire section of this Report & Recommendation, see Quinones v. Miller, 01 Civ. 10752, 2003 WL 21276429 at *16-18 (S.D.N.Y. June 3, 2003) (Peck, M.J.); Wilson v. Senkowski, 02 Civ. 0231, 2003 WL 21031975 at *5-7 (S.D.N.Y. May 7, 2003) (Peck, M.J.); Naranjo v. Filion, 02 Civ. 5449, 2003 WL 1900867 at *5-7 (S.D.N.Y. Apr. 16, 2003) (Peck, M.J.); Hediam v. Miller, 02 Civ. 1419, 2002 WL 31867722 at *8-10 (S.D.N.Y. Dec. 23, 2002) (Peck, M.J.); Dickens v. Filion, 02 Civ. 3450, 2002 WL 31477701 at *6-8 (S.D.N.Y. Nov. 6, 2002) (Peck, M.J.), report & rec. adopted, 2003 WL 1621702 (S.D.N.Y. Mar. 28, 2003) (Cote, D.J.); Figueroa v. Greiner, 02 Civ. 2126, 2002 WL 31356512 at *5-6 (S.D.N.Y. Oct. 18, 2002) (Peck, M.J.); Aramas v. Donnelly, 99 Civ. 11306, 2002 WL 31307929 at *6-8 (S.D.N.Y. Oct. 15, 2002) (Peck, M.J.); Velazquez v. Murray, 02 Civ. 2564, 2002 WL 1788022 at *12-14 (S.D.N.Y. Aug. 2, 2002) (Peck, M.J.); Soto v. Greiner, 02 Civ. 2129, 2002 WL 1678641 at *6-7 (S.D.N.Y. July 24, 2002) (Peck, M.J.); Green v. Herbert, 01 Civ. 11881, 2002 WL 1587133 at *9-11 (S.D.N.Y. July 18, 2002) (Peck, M.J.); Bueno v. Walsh, 01 Civ. 8738, 2002 WL 1498004 at *10-11 (S.D.N.Y. July 12, 2002) (Peck, M.J.); Larrea v. Bennett, 01 Civ. 5813, 2002 WL 1173564 at *14 (S.D.N.Y. May 31, 2002) (Peck, M.J.), report & rec. adopted, 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2000) (Scheindlin, D.J.); Jamison v. Berbary, 01 Civ. 5547, 2002 WL 1000283 at *8-9 (S.D.N.Y. May 15, 2002) (Peck, M.J.); Cromwell v. Keane, 98 Civ. 0013, 2002 WL 929536 at *12-13 (S.D.N.Y. May 8, 2002) (Peck, M.J.); Jamison v. Grier, 01 Civ. 6678, 2002 WL 100642 at 8-9 (S.D.N.Y. Jan. 25, 2002) (Peck, M.J.); Thomas v. Breslin, 01 Civ. 6657, 2002 WL 22015 at *4-5 (S.D.N.Y. Jan. 9, 2002) (Peck, M.J.); Thomas v. Duncan, 01 Civ. 6792, 2001 WL 1636974 at *7 (S.D.N.Y. Dec. 21, 2001) (Peck, M.J.); Rivera v. Duncan, 00 Civ. 4923, 2001 WL 1580240 at *6 (S.D.N.Y. Dec. 11, 2001) (Peck, M.J.); Rodriguez v. Lord, 00 Civ. 0402, 2001 WL 1223864 at *16 (S.D.N.Y. Oct. 15, 2001) (Peck, M.J.); James v. People of the State of New York, 99 Civ. 8796, 2001 WL 706044 at *11 (S.D.N.Y. June 8, 2001) (Peck, M.J.), report & rec. adopted, 2002 WL 31426266 (S.D.N.Y. Oct. 25, 2002) (Berman, D.J.); Ventura v. Artuz, 99 Civ. 12025, 2000 WL 995497 at *5 (S.D.N.Y. July 19, 2000) (Peck, M.J.); Mendez v. Artuz, 98 Civ. 2652, 2000 WL 722613 at *22 (S.D.N.Y. June 6, 2000) (Peck, M.J.), report & rec. adopted, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), aff'd, 303 F.3d 411, 417 (2d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); Fluellen v. Walker, 97 Civ. 3189, 2000 WL 684275 at *10 (S.D.N.Y. May 25, 2000) (Peck, M.J.), aff'd, No. 01-2474, 41 Fed. Appx. 497, 2002 WL

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Before the Court can determine whether Skinner is entitled to federal habeas relief, the Court must address the proper habeas corpus review standard under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

In enacting the AEDPA, Congress significantly "modifie[d] the role of federal habeas courts in reviewing petitions filed by state prisoners." Williams v. Taylor, 529 U.S. 362, 403, 120 S. Ct. 1495, 1518 (2000). The AEDPA imposed a more stringent review standard, as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2); see also, e.g., Eze v. Senkowski, 321 F.3d 110, 120 (2d Cir. 2003) ("AEDPA changed the landscape of federal habeas corpus review by 'significantly curtail[ing] the power of federal courts to grant the habeas petitions of state prisoners.'") (quoting Lainfiesta v. Artuz, 253 F.3d 151, 155 (2d Cir. 2001), cert. denied, 535 U.S. 1019, 122 S. Ct. 1611 (2002)).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) have "independent meaning." Williams v. Taylor, 529 U.S. at 404-05, 120 S. Ct. at 1519.[9/] Both,

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[8/] (...continued)
1448474 (2d Cir. June 28, 2002), cert. denied, 123 S. Ct. 1787 (2003).

[9/] Accord, e.g., Jones v. Stinson, 229 F.3d 112, 119 (2d Cir. 2000); Lurie v. Wittner, 228 F.3d 113, 125 (2d Cir. 2000), cert. denied, 532 U.S. 943, 121 S. Ct. 1404 (2001); Clark v. Stinson, (continued...)

however, "restrict[ ] the source of clearly established law to [the Supreme] Court's jurisprudence." Williams v. Taylor, 529 U.S. at 412, 120 S. Ct. at 1523.[10/] "That federal law, as defined by the Supreme Court, may either be a generalized standard enunciated in the [Supreme] Court's case law or a bright-line rule designed to effectuate such a standard in a particular context." Kennaugh v. Miller, 289 F.3d at 42. "A petitioner cannot win habeas relief solely by demonstrating that the state court unreasonably applied Second Circuit precedent." Yung v. Walker, 296 F.3d at 135; accord, e.g., DelValle v. Armstrong, 306 F.3d at 1200.

As to the "contrary to" clause:

> A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases. . . . A state-court decision will also be contrary to [the Supreme] Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent.

Williams v. Taylor, 529 U.S. at 405-06, 120 S. Ct. at 1519-20.[11/]

In Williams, the Supreme Court explained that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing

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[9/] (...continued)
214 F.3d 315, 320 (2d Cir. 2000), cert. denied, 531 U.S. 1116, 121 S. Ct. 865 (2001).

[10/] Accord, e.g., DelValle v. Armstrong, 306 F.3d 1197, 1200 (2d Cir. 2002); Yung v. Walker, 296 F.3d 129, 135 (2d Cir. 2002); Kennaugh v. Miller, 289 F.3d 36, 42 (2d Cir.), cert. denied, 123 S. Ct. 251 (2002); Loliscio v. Goord, 263 F.3d 178, 184 (2d Cir. 2001); Sellan v. Kuhlman, 261 F.3d 303, 309 (2d Cir. 2001).

[11/] Accord, e.g., DelValle v. Armstrong, 306 F.3d at 1200; Yung v. Walker, 296 F.3d at 135; Kennaugh v. Miller, 289 F.3d at 42; Loliscio v. Goord, 263 F.3d at 184; Lurie v. Wittner, 228 F.3d at 127-28.

legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 529 U.S. at 413, 120 S. Ct. at 1523. However, "[t]he term 'unreasonable' is . . . difficult to define." Id. at 410, 120 S. Ct. at 1522. The Supreme Court made clear that "an unreasonable application of federal law is different from an incorrect application of federal law." Id.[12/] Rather, the issue is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 539 U.S. at 409, 120 S. Ct. at 1521.[13/] The Second Circuit has explained "that while '[s]ome increment of incorrectness beyond error is required . . . the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.'" Jones v. Stinson, 229 F.3d at 119 (quoting Francis S. v. Stone, 221 F.3d 100, 111 (2d Cir. 2000)).[14/] Moreover, the Second Circuit has held "that a state court determination is reviewable under AEDPA if the state decision unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to situations which that principle should have, in reason, governed." Kennaugh v. Miller, 289 F.3d at 45; accord Yung v. Walker, 296 F.3d at 135. Under the AEDPA, in short, the federal

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[12/] See also, e.g., Eze v. Senkowski, 321 F.3d at 124-25; DelValle v. Armstrong, 306 F.3d at 1200 ("With regard to issues of law, therefore, if the state court's decision was not an unreasonable application of, or contrary to, clearly established federal law as defined by Section 2254(d), we may not grant habeas relief even if in our judgment its application was erroneous.").

[13/] Accord, e.g., Eze v. Senkowski, 321 F.3d at 125; Ryan v. Miller, 303 F.3d 231, 245 (2d Cir. 2002); Yung v. Walker, 296 F.3d at 135; Loliscio v. Goord, 263 F.3d at 184; Lurie v. Wittner, 228 F.3d at 128-29.

[14/] Accord, e.g., Eze v. Senkowski, 321 F.3d at 125; Ryan v. Miller, 303 F.3d at 245; Yung v. Walker, 296 F.3d at 135; Loliscio v. Goord, 263 F.3d at 184.

courts "must give the state court's adjudication a high degree of deference." Yung v. Walker, 296 F.3d at 134.

Even where the state court decision does not specifically refer to either the federal claim or to relevant federal case law, the deferential AEDPA review standard applies:

> For the purposes of AEDPA deference, a state court "adjudicate[s]" a state prisoner's federal claim on the merits when it (1) disposes of the claim "on the merits," and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court's decision on the federal claim – even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.

Sellan v. Kuhlman, 261 F.3d at 312; accord, e.g., Cotto v. Herbert, No. 01-2694, 2003 WL 1989700 at *6 (2d Cir. May 1, 2003); Eze v. Senkowski, 321 F.3d at 121; Ryan v. Miller, 303 F.3d at 245; Aeid v. Bennett, 296 F.3d 58, 62 (2d Cir.), cert. denied, 123 S. Ct. 694 (2002); Jenkins v. Artuz, 294 F.3d 284, 291 (2d Cir. 2002) ("In Sellan, we found that an even more concise Appellate Division disposition – the word 'denied' – triggered AEDPA deference."); Norde v. Keane, 294 F.3d 401, 410 (2d Cir. 2002); Aparicio v. Artuz, 269 F.3d 78, 93 (2d Cir. 2001).[15/] "By its terms, § 2254(d)

[15/] The Second Circuit "recognize[d] that a state court's explanation of the reasoning underlying its decision would ease our burden in applying the 'unreasonable application' or 'contrary to' tests." Sellan v. Kuhlman, 261 F.3d at 312. Where the state court does not explain its reasoning, the Second Circuit articulated the analytic steps to be followed by a federal habeas court:

> We adopt the Fifth Circuit's succinct articulation of the analytic steps that a federal habeas court should follow in determining whether a federal claim has been adjudicated "on the merits" by a state court. As the Fifth Circuit has explained, "[W]e determine whether a state court's disposition of a petitioner's claim is on the merits by considering: (1) what the state courts have done in similar cases; (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and (3) whether the state court's opinion suggests reliance upon procedural grounds rather than a determination on the

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requires such deference only with respect to a state-court 'adjudication on the merits,' not to a disposition 'on a procedural, or other, ground.' Where it is 'impossible to discern the Appellate Division's conclusion on [the relevant] issue,' a federal court should not give AEDPA deference to the state appellate court's ruling." Miranda v. Bennett, 322 F.3d 171, 177-78 (2d Cir. 2003) (citations omitted).[16/] Of course, "if there is no [state court] adjudication on the merits, then the pre-AEDPA, de novo standard of review applies." Cotto v. Herbert, 2003 WL 1989700 at *7.

15/ (...continued)
merits." Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999).

Sellan v. Kuhlman, 261 F.3d at 314; accord, e.g., Cotto v. Herbert, 2003 WL 1989700 at *6; Eze v. Senkowski, 321 F.3d at 121-22; Norde v. Keane, 294 F.3d at 410; Aparicio v. Artuz, 269 F.3d at 93.

16/ The Second Circuit in Miranda v. Bennett continued: "Generally, when the Appellate Division opinion states that a group of contentions is either without merit 'or' procedurally barred, the decision does not disclose which claim in the group has been rejected on which ground. If the record makes it clear, however, that a given claim had been properly preserved for appellate review, we will conclude that it fell into the 'without merit' part of the disjunct even if it was not expressly discussed by the Appellate Division." Id. at 178.

II. SKINNER'S FOURTH AMENDMENT CLAIM THAT HE WAS ARRESTED WITHOUT PROBABLE CAUSE SHOULD BE DENIED BECAUSE IT CANNOT PROVIDE A BASIS FOR HABEAS RELIEF UNDER STONE V. POWELL[17/]

Skinner's habeas petition asserts that he was arrested without probable cause and the subsequent identification procedures and the seizure of his coat were therefore fruits of his unlawful arrest. (Dkt. No. 1: Pet. ¶¶ 12(A)-(B).) At Skinner's pretrial Mapp/Dunaway/Wade hearing, Skinner challenged his arrest as unsupported by probable cause and moved for the suppression of subsequent line-up identifications and his black jacket. (See generally H. 1-299; see also pages 3-6 above.) After a four-day hearing, the court held that the officers had probable cause to arrest Skinner and denied his motions to suppress. (H. 288-97; see page 6 above.)

Skinner's Fourth Amendment claim must be assessed by reference to the Supreme Court's decision in Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037 (1976), which precludes habeas review of Fourth Amendment claims that have been litigated in state court:

> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief

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17/ For additional decisions authored by this Judge discussing the Stone v. Powell standard on habeas review in language substantially similar to the legal analysis in this entire section of this Report & Recommendation, see Tibbs v. Greiner, 01 Civ. 4319, 2003 WL 1878075 *11-13 (S.D.N.Y. Apr. 16, 2003) (Peck, M.J.); Roberts v. Batista, 01 Civ. 5264, 2003 WL 1900866 at *5-7 (S.D.N.Y. Apr. 16, 2003) (Peck, M.J.); Lesane v. Dixon, 01 Civ. 9867, 2002 WL 977528 at *4 (S.D.N.Y. May 13, 2002) (Peck, M.J.); Herring v. Miller, 01 Civ. 2920, 2002 WL 461573 at *2-3 (S.D.N.Y. Mar. 27, 2002) (Peck, M.J); Gumbs v. Kelly, 97 Civ. 8755, 2000 WL 1172350 at *9 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.); Solomon v. Artuz, 00 Civ. 0860, 2000 WL 863056 at *4 (S.D.N.Y. June 28, 2000) (Peck, M.J); Roberson v. McGinnis, 99 Civ. 9751, 2000 WL 378029 at *5 (S.D.N.Y. Apr. 11, 2000) (Batts, D.J. & Peck, M.J.); Cruz v. Greiner, 98 Civ. 7939, 1999 WL 1043961 at *24 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); Jones v. Strack, 99 Civ. 1270, 1999 WL 983871 at *9 (S.D.N.Y. Oct. 29, 1999) (Peck, M.J.); Torres v. Irvin, 33 F. Supp. 2d 257, 274-75 (S.D.N.Y. 1998) (Cote, D.J. & Peck, M.J.); Robinson v. Warden of James A. Thomas Ctr., 984 F. Supp. 801, 804-05 (S.D.N.Y. 1997) (Sprizzo, D.J. & Peck, M.J.).

> on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.

Stone v. Powell, 428 U.S. 465, 494-95, 96 S. Ct. 3037, 3052-53 (1976) (fns. omitted).[18/]

The Second Circuit, sitting en banc, has concluded that Stone v. Powell permits federal habeas review of exclusionary rule contentions only in limited circumstances:

> If the state provides no corrective procedures at all to redress Fourth Amendment violations, federal habeas corpus remains available. It may further be that even where the state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process, the federal intrusion may still be warranted.

Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (citations omitted), cert. denied, 434 U.S. 1038, 98 S. Ct. 775 (1978).[19/]

Here, Skinner litigated his Fourth Amendment claim at his pretrial suppression hearing. (See pages 3-6 above.) During a four-day Dunaway/Mapp/Wade hearing, four police

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[18/] Accord, e.g., Withrow v. Williams, 507 U.S. 680, 682-86, 113 S. Ct. 1745, 1748-50 (1993); McClesky v. Zant, 499 U.S. 467, 479, 111 S. Ct. 1454, 1462 (1991); Fowler v. Kelly, No. 95-2527, 104 F.3d 350 (table), 1996 WL 521454 at *3 (2d Cir. Sept. 16, 1996); Capellan v. Riley, 975 F.2d 67, 69-71 (2d Cir. 1992); Grey v. Hoke, 933 F.2d 117, 121 (2d Cir. 1991); Plunkett v. Johnson, 828 F.2d 954, 956 (2d Cir. 1987).

[19/] Accord, e.g., Graham v. Costello, 299 F.3d 129, 133-34 (2d Cir. 2002); Branch v. McClellan, No. 96-2954, 234 F.3d 1261 (table), 2000 WL 1720934 at *3 (2d Cir. Nov. 17, 2000); Capellan v. Riley, 975 F.2d at 70; Aziz v. Warden of Clinton Correctional Facility, 92 Civ. 104, 1992 WL 249888 at *3 (S.D.N.Y. Sept. 23, 1992), aff'd, 993 F.2d 1533 (2d Cir.), cert. denied, 510 U.S. 888, 114 S. Ct. 241 (1993); Allah v. LeFevre, 623 F. Supp. 987, 990-92 (S.D.N.Y. 1985); see also, e.g., Smith v. Senkowski, No. 97 CV 1280, 1999 WL 138903 at *6 (E.D.N.Y. Mar. 10, 1999) (Petitioner claimed he was arrested without probable cause and that his pretrial statements therefore should have been suppressed. "A federal court is not permitted to judge the merits of the state court's decision. The Court need only find that the State's procedure for resolving Fourth Amendment claims is 'facially adequate' and that no unconscionable breakdown' of the process occurred in the petitioner's case. An unconscionable breakdown occurs when the state court fails to conduct a reasoned inquiry into the petitioner's claim.") (citing Capellan v. Riley, 975 F.2d at 71).

officers, a sergeant, and a lieutenant testified as to the probable cause that led to Skinner's arrest (H. 3-125), and an additional three detectives and two District Attorney's Office investigators provided testimony about the identification procedures. (H. 129-257.) Skinner's trial counsel cross-examined each of these witnesses. (See generally H. 3-257.) Thus, state corrective process was not only available but was employed for Skinner's Fourth Amendment claims, which therefore cannot support a petition for a writ of habeas corpus. See, e.g., Gandarilla v. Artuz, 322 F.3d 182, 185 (2d Cir. 2003) ("[T]he merits of a Fourth Amendment challenge are not reviewable in a federal habeas proceeding if a defendant has had a fair opportunity to litigate that question in State court . . ."); Graham v. Costello, 299 F.3d at 134 ("[O]nce it is established that a petitioner has had an opportunity to litigate his or her Fourth Amendment claim (whether or not he or she took advantage of the state's procedure), the [state] court's denial of the claim is a conclusive determination that the claim will never present a valid basis for federal habeas relief."); Blagrove v. Mantello, No. 95-2821, 104 F.3d 350 (table), 1996 WL 537921 at *2 (2d Cir. Sept. 24, 1996) (where defendant's "Fourth Amendment issues were raised before the trial court in the suppression hearing and before the Appellate Division in [his] pro se brief" defendant's "Fourth Amendment argument is barred [from federal habeas review] because the issue was fully and fairly litigated in the state courts."); Capellan v. Riley, 975 F.2d at 70 & n.1 (noting that "the 'federal courts have approved New York's procedure for litigating Fourth Amendment claims. . . .'"); McPhail v. Warden, Attica Corr. Facility, 707 F.2d 67, 69 (2d Cir. 1983) (New York's procedure for litigating a Fourth Amendment claim in a criminal trial complied with requirement that state provide an opportunity to litigate such claims).[20/]

[20/] See also, e.g., Montero v. Sabourin, 02 Civ. 8666, 2003 WL 21012072 at *5 (S.D.N.Y. May 5, 2003) ("[H]abeas review of Fourth Amendment claims that were, or could have been, (continued...)

Skinner's claim that he was arrested without probable cause and that his coat and the line-up identifications therefore should be suppressed is a Fourth Amendment claim that is not cognizable on habeas review. E.g., Jackson v. Scully, 781 F.2d 291, 297 (2d Cir. 1986) (Even where state conceded that petitioner's arrest lacked probable cause, petitioner's claim that his post-arrest questioning was fruit of the illegal arrest was barred because New York "clearly provided" petitioner with "an opportunity fully and fairly to litigate" the Fourth Amendment claim.); Chavis v. Henderson, 638 F.2d 534, 538 (2d Cir. 1980) (Petitioner's claim "that his arrest was without probable cause and that therefore the identification evidence should have been excluded, was properly rejected by the district court. [Petitioner] made no showing . . . that he had been precluded from a full and fair opportunity to litigate this issue in the state courts. Under Stone v. Powell . . . , he may not urge the same grounds for federal habeas corpus relief."), cert. denied, 454 U.S. 842, 102 S. Ct. 152 (1981); Roberson v. McGinnis, 2000 WL 378029 at *5 (Under Stone v. Powell, the Court was precluded from reviewing petitioner's claim that his conviction was based on his confession and the

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20/ (...continued)
previously litigated in state court are barred by Stone v. Powell . . . . It has long been acknowledged that New York provides adequate procedures under C.P.L. § 710 et seq., for litigating Fourth Amendment claims."); Ferron v. Goord, No. 99-CV-6421, 2003 WL 1786993 at *2 (W.D.N.Y. Mar. 27, 2003) ("The Second Circuit has noted that Stone requires only that the 'the state have provided the opportunity to the state prisoner for full and fair litigation of the Fourth Amendment claim.") (quoting Gates v. Henderson, 568 F.2d at 839); Baker v. Bennett, 01 Civ. 1368, 2002 WL 31802302 at *6 (S.D.N.Y. Dec. 6, 2002) ("The state court need only grant a petitioner 'an opportunity for full and fair litigation of a fourth amendment claim.'") (quoting Capellan v. Riley, 975 F.2d at 70); Fayton v. Goord, 01 Civ. 2912, 2001 WL 694573 at *1 (S.D.N.Y. June 18, 2001) ("Since this petition is based on a fully and fairly litigated Fourth Amendment claim . . . such relief cannot be granted."); Gumbs v. Kelly, 2000 WL 1172350 at *10 (New York's procedure for litigating Fourth Amendment claims provides full and fair opportunity to litigate claim); Hunter v. Greiner, 99 Civ. 4191, 2000 WL 245864 at *6 (S.D.N.Y. Mar. 3, 2000).

identification testimony obtained as a result of his unlawful arrest. Petitioner had the opportunity to fully and fairly litigate this Fourth Amendment claim during his pretrial suppressing hearing and First Department appeal.); see, e.g., Pina v. Kuhlmann, 239 F. Supp. 2d 285, 289 (E.D.N.Y. 2003) (Habeas review unavailable for petitioner's claim that since the police lacked probable cause to arrest him, his post-arrest statements should have been suppressed. "It is well settled that such claims are not cognizable for habeas corpus review where the State has provided a full and fair opportunity to litigate this issue."); Manning v. Strack, No. CV 99-3874, 2002 WL 31780175 at *4 (E.D.N.Y. Oct. 11, 2002) (Raggi, D.J.) ("Stone v. Powell prohibits habeas review of [petitioner's] Fourth Amendment claim" that "he was arrested without probable cause" and that his "identifications and . . . statements should have been suppressed as the fruits of this unlawful arrest." Petitioner "was afforded a full evidentiary hearing on his arrest challenge, as well as one appeal of right and one opportunity to move for leave to appeal."); Senor v. Greiner, No. 00-CV-5673, 2002 WL 31102612 at *10-11 (E.D.N.Y. Sept. 18, 2002) (Habeas claim barred where petitioner argued that he was arrested without probable cause and lineup identifications therefore should have been suppressed. Petitioner "cannot claim that the state lacked sufficient procedures for redress of his Fourth Amendment claims because the courts in this circuit have expressly approved New York's procedure for litigating such claims. . ." nor has petitioner "alleged that an unconscionable breakdown in the process occurred."); Bilbrew v. Garvin, No. 97-CV-1422, 2001 WL 91620 at *4-5 (E.D.N.Y. Jan. 10, 2001) (Where petitioner "was not denied the opportunity to litigate his Fourth Amendment claims in the state courts, [the habeas court] will not consider" petitioner's claims "that his statements to the police and the station house identifications of him should have been suppressed as 'fruits' of an unlawful arrest . . . . made without probable cause."); Ortiz v. Artuz, 113 F. Supp. 2d 327, 335-36

(E.D.N.Y. Sept. 8, 2000) ("Petitioner argue[d] that he was arrested without probable cause in violation of the Fourth Amendment and that his pretrial statement and the identification procedure should have been suppressed as the fruit of the illegal arrest." Because "[t]he hearing court conducted a reasoned inquiry into petitioner's claim and determined that there was probable cause for his arrest, and the Appellate Division affirmed on the merits. . . . petitioner's Fourth Amendment claim is unreviewable by this Court."), aff'd, No. 00-2713, 36 Fed. Appx. 1, 2002 WL 126131 (2d Cir. Jan. 28, 2002), cert. denied, 536 U.S. 909, 122 S. Ct. 2367 (2002).[21/]

[21/] See also, e.g., Dawson v. Donnelly, 111 F. Supp. 2d 239, 247 (W.D.N.Y. 2000) (Where petitioner's habeas claim that "he was under arrest when he confessed and that there was no probable cause for his arrest" was also raised in a pretrial suppression motion and in his direct state appeal, the state courts gave petitioner "a full and fair opportunity to litigate the claim. Therefore, this Court is precluded from addressing it in the context of a Federal habeas proceeding, and the claim must be dismissed."); Senor v. Senkowski, No. 97-CV-4929, 1999 WL 689477 at *8 (E.D.N.Y. Aug. 31, 1999) (Habeas court cannot consider petitioner's claim that his "arrest violated the Fourth Amendment, and that the lineup identifications were fruit of that unlawful arrest."); Joyner v. Leonardo, 99 Civ. 1275, 1999 WL 608774 at *3-4 (S.D.N.Y. Aug. 12, 1999) (Petitioner's claim that the police lacked probable cause to arrest him and that his subsequent identifications should be suppressed was "rejected under the doctrine established by the Supreme Court in Stone v. Powell . . . "); France v. Artuz, No. 98-CV-3850, 1999 WL 1251817 at *6 (E.D.N.Y. Dec. 17, 1999) (Where petitioner's habeas claim that his statements should be suppressed because he was arrested without probable cause was addressed during a pretrial suppression hearing, his claim was denied "[b]ecause petitioner was given a full and fair opportunity in the state courts to litigate this Fourth Amendment issue . . ."); Quinones v. Keane, 97 Civ. 3173, 1998 WL 851583 at *4-5 (S.D.N.Y. Dec. 7, 1998) (Habeas court barred from considering petitioner's claim that his statements should be suppressed because he "was detained without probable cause when he gave the statements."); Maldonado v. Giambrum, 98 Civ. 0058, 1998 WL 841488 at *2 (S.D.N.Y. Dec. 3, 1998) (Petitioner "claim[ed] that the police did not have probable cause to place him under arrest and, for that reason, the evidence acquired after the arrest should not have been admitted at his trial." Because petitioner was "afforded an adequate opportunity to address this fourth amendment claim in the state court proceedings . . . . [the habeas court] need not consider [petitioner's] claim."); Sansalone v. Kuhlmann, 96 Civ. 9231, 1998 WL 804693 at *1 (S.D.N.Y. Nov. 16, 1998) (Parker, D.J.) (Petitioner's "claim, alleging that a lack of probable cause for his arrest warranted (continued...)

Accordingly, because Skinner was given a full and fair opportunity to litigate his Fourth Amendment claim in state court, Skinner's claim that he was arrested without probable cause is not cognizable on habeas review and should be denied.

III. SKINNER'S CLAIM THAT THE PROSECUTION VIOLATED BRADY V. MARYLAND SHOULD BE DENIED

Skinner's habeas petition asserts that the prosecution: (1) "withheld information that co-defendant Anibal Rosa was under cooperation with the DA's office and used this to enlist the Rosa famil[y's] perjured testimony"; (2) "withheld information of the name of the shooter under indictment #4378/96 provided to them by Anibal Rosa"; and (3) "never turned over any of the DD'5 reports or police memo[]s for the arresting detectives under indictments #4378/96 and #8190/96."[22/] (Dkt. No. 1: Pet. ¶ 12(C).) Skinner claims that he "discovered an array of fabricated information against him that was conflicting at this trial when Anibal Rosa[] testified at another trial one year

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[21/] (...continued)
suppression of . . . identification testimony . . . [is] precluded from review here because the issues were fully and fairly litigated both in pre-trial hearings and on direct review."); Moreno v. Kelly, 95 Civ. 1546, 1997 WL 109526 at *8 (S.D.N.Y. Mar. 11, 1997) (Where petitioner alleged that his arrest was not based on probable cause and "that all post-arrest identifications should therefore be suppressed as the fruits of an unconstitutional arrest," petitioner's claim was "not a basis for federal habeas relief." Because the trial court held a combined identification, suppression, and probable cause hearing, which was reviewed on direct appeal, petitioner "received a 'full and fair' opportunity to litigate his Fourth Amendment claim in the state courts and this [habeas] court has no authority to revisit the issue." Petitioner's "contention that the trial court's pre-trial determination was incorrect does not entitle him to federal habeas review."); Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908 at *4 (E.D.N.Y. Nov. 5, 1995) ("[Stone v.] Powell and its progeny" barred review of petitioner's claims that his arrest lacked probable cause and that his line-up identification should have been suppressed as fruit of this unlawful arrest.).

[22/] "DD-5s" are "complaint follow-up reports." See Bynum v. Duncan, 02 Civ. 2124, 2003 WL 296563 at *9 (S.D.N.Y. Feb. 12, 2003).

later, and proved that he was the confidential informant and sole source of information against petitioner although the prosecutor denied this on the record before the trial court." (Dkt. No. 19: Traverse at 49.)

A. Skinner's Brady Claim is Exhausted

Contrary to the State's argument, Skinner did exhaust his claim that the prosecution failed to disclose its cooperation agreement with Rosa and the fact that Rosa named Morales' shooter. While the State asserts that Skinner "first addressed the 'secret cooperation' of Anibal Rosa in his application for a writ of coram nobis" (Dkt. No. 15: State Br. at 25-28), Skinner properly raised the claim in his July 12, 2001 C.P.L. § 440 motion. (Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Motion.)

In his July 2001 C.P.L. § 440 motion, under the heading "Rosario and Brady Violation," Skinner alleged, in part, that

> Anibal "Puti" Rosa, in his testimony under indictment #3790/97 testified that he told ADA Gagan, who the shooter was under indictment #4378/96 before [Skinner's] trial and none of the documents pertaining to this information were turned over to the defense. . . . Had the People revealed this information it would not have cleared [Skinner] but it would have revealed the People's theory of this shooting was fabricated by ADA Gagan. . . .

(Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Motion at 36.) Skinner's February 2002 "addendum" further asserted that

> Defendant's alleged co-defendant Anibal Rosa, who was under secret cooperation with the District Attorney's Office in New York, and Queens Counties, had prior to [Skinner's] trial informed the DA's office and trial prosecutor who the shooter was under indictment #4378/96. However, at trial and prior to trial the People claimed not to have known the identity of this person . . . . The fact that the jury never knew anything about the shooter's identification is clearly a Brady Violation. The People were concern[ed] that . . . this revelation of important undisclosed facts . . . [would] cause the jury to acquit [Skinner].

(Dkt. No. 17: Skinner 2/26/02 C.P.L. § 440 Motion Addendum at 5.)

The Court assumes that Skinner's July 2001 C.P.L. § 440 motion and February 2002 addendum were denied prior to or as part of the only ruling subsequent to July 2001 that appears in the record, namely Justice Wetzel's May 16, 2002 Order. (Dkt. No. 8: 5/16/02 Justice Wetzel Decision.) In that order, Justice Wetzel denied all of Skinner's other claims (except his counsel conflict claim) as "a rehash of previously filed, decided, and in many cases already appealed motions." (Id.) The First Department denied leave to appeal on August 29, 2002. (Dkt. No. 16: Israel Aff. Ex. Z: 8/29/02 1st Dep't Order.) Since the State has not argued that Justice Wetzel denied Skinner's Brady claim on an adequate and independent state ground (because the State asserted that the claim was never raised in a C.P.L.§ 440 motion), the Court will address the Brady claim on the merits.

B. The Brady v. Maryland Standard[23/]

Under Brady v. Maryland and its progeny, state as well as federal prosecutors must turn over exculpatory and impeachment evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. See, e.g., Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948 (1999); United States v. Bagley, 473 U.S. 667, 676, 682, 105 S. Ct. 3375, 3380, 3383-84 (1985); United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 2399 (1976); Brady

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23/ For additional decisions authored by this Judge discussing the Brady v. Maryland standard in language substantially similar to that in this entire section of this Report & Recommendation, see Mendez v. Artuz, 98 Civ. 2652, 2000 WL 722613 at *11-12 (S.D.N.Y. June 6, 2000) (Peck, M.J.), report & rec. adopted, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), aff'd, 303 F.3d 411 (2d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); Franza v. Stinson, 58 F. Supp. 2d 124, 153 (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.).

v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).[24/] The Brady rule also encompasses evidence known only to the police: "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Strickler v. Greene, 527 U.S. at 281, 119 S. Ct. at 1948 (quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995)).

The Brady rule does not require a prosecutor to "deliver his entire file to defense counsel," but only to disclose those items which are material to the defendant's guilt or punishment. United States v. Bagley, 473 U.S. at 675, 105 S. Ct. at 3380; accord, e.g., Kyles v. Whitley, 514 U.S. at 437, 115 S. Ct. at 1567 ("We have never held that the Constitution demands on open file policy."); United States v. Agurs, 427 U.S. at 108-09, 96 S. Ct. at 2400.[25/]

"There are three components of a true Brady violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. at 281-82, 119 S. Ct. at 1948.[26/]

[24/] See also, e.g., United States v. Diaz, 176 F.3d 52, 108 (2d Cir.), cert. denied, 120 S. Ct. 181 (1999); Tankleff v. Senkowski, 135 F.3d 235, 250 (2d Cir. 1998); Orena v. United States, 956 F. Supp. 1071, 1090-92 (E.D.N.Y. 1997) (Weinstein, D.J.).

[25/] See also, e.g., Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992); United States v. Gaggi, 811 F.2d 47, 59 (2d Cir.), cert. denied, 482 U.S. 929, 107 S. Ct. 3214 (1987); Hoover v. Leonardo, No. 91-CV-1211, 1996 WL 1088204 at *2 (E.D.N.Y. June 11, 1996).

[26/] See also, e.g., Moore v. Illinois, 408 U.S. 786, 794-95 , 92 S. Ct. 2562, 2568 (1972); United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), cert. denied, 516 U.S. 1165, 116 S. Ct. 1056 (1996); Orena v. United States, 956 F. Supp. at 1090.

C. Additional Facts Underlying Skinner's Brady Claim

The prosecutor in Skinner's case denied twice on the record that the District Attorney's Office had entered into a cooperation agreement with Anibal Rosa about Skinner's case. (Tr. 695-701, 1469-70.) The following exchange took place on February 11, 1997, after the testimony of Edith Velasquez, Anibal Rosa's aunt, outside the presence of the jury:

> Ms. Stewart: Judge, I just ask to place on the record – try to recreate the substance of the sidebar conference that we had off the record during the questioning of this last witness, Ms. Velasquez.
>
> I had asked for the sidebar in order to inquire whether or not her nephew, Anibal Rosa, was cooperating with [Assistant District Attorney] Gagan's office. And I said that I had information, I believe, from Mr. Gagan himself that [Rosa] was cooperating, and I wanted to know whether this aunt was maybe perhaps somehow involved in that cooperation or knew of it. I guess I will let Mr. Gagan answer for himself.
>
> The Court: . . . Mr. Gagan indicated that he had not been in a cooperation agreement.
>
> Mr. Gagan: There is no cooperation agreement.
>
> The Court: There is no cooperation agreement?
>
> Mr. Gagan: No, not at this time.
>
> Ms. Stewart: And I indicated that that does not necessarily mean that someone is not coming in and proffering and in discussion, even though they may not have been signed up by the office yet and given any kind of consideration therefor.
>
> The Court: But [Mr. Gagan] made a representation to the Court that . . . he had no intention to call Mr. Rosa as a witness, which goes beyond, in my opinion, cooperating.
>
> Ms. Stewart: Well, no, he could be cooperating in something else, Judge, and not called as a witness here because he's being protected . . . . There's a possibility that [the District Attorney's Office] may want him to talk about something else for another case but not this case.

The Court: All right, has there been any agreement or any attempt to reach an agreement of cooperation with Mr. Rosa?

Mr. Gagan: As for this case, no.

The Court: How about as to any other cases?

Mr. Gagan: Well, yeah, your Honor, we talk to people all the time, and in fact, Mr. Skinner came there and talked to us on a "Queen For A Day" agreement when he had [previous trial counsel] so, obviously, Mr. Skinner is not cooperating with us, so whether someone comes in and talks to us is a different matter than if they are cooperating, and Mr. Rosa is not cooperating in this case, and there is no cooperation in this case. He's not testifying in this case, and I will produce him for Ms. Stewart to call him as a witness if she would like.

Ms. Stewart: Judge, can I just say that I think Mr. Gagan's very definitive in this case.

Each thing that he said delineates where this may be going, and I would state for the record that Mr. Rosa was involved in a highly-publicized incident, a shooting in Queens where people, I believe, were murdered, and he is accused of being a participant in those murders, and it is my understanding that he was very anxious to cut some kind of a deal somewhere.

Now I recognize that whatever he may be doing in Queens has no relationship but it seems to me if he is involved with Mr. Gagan's office, whether it is in this case or another case, it has been known that a relative would come in to testify rather than expose the person of the first party because he has too much baggage to come in with [them]. They don't want another witness that hurts them more than he helps them.

(Tr. 695-98; see also Tr. 699-701.)

On February 19, 1997, based on the substance of A.D.A. Gagan's cross-examination of Skinner, the issue of Rosa's possible cooperation was again raised by defense attorney Stewart and again denied by A.D.A. Gagan:

Ms. Stewart: Well, Judge, I asked this question at the side bar when Ms. Velasquez was on the stand, whether Anibal Rosa was cooperating, was actively seeking to cooperate and had an agreement, and I would ask once again, based on this

extensive series of questions, . . . it seems to me those questions had to come from Anibal Rosa; there is no other way.

The Court: It didn't seem that way to me . . . .

Put the question to the assistant [district attorney], whether Anibal Rosa is cooperating in this case.

Mr. Gagan: No.

(Tr. 1469-70.)

Skinner claims that Anibal Rosa's subsequent testimony at another trial "proved that he was the confidential informant and sole source of information against [Skinner] although the prosecutor denied this on the record before the trial court" and therefore Assistant District Attorney Gagan withheld this information from Skinner and his counsel during his trial. (Dkt. No. 19: Traverse at 49.)

On June 24, 1998, Anibal Rosa testified in Supreme Court, New York County, in the case of People v. David Rodriquez, et al., indictment number 3790/97. (Dkt. No. 17: Skinner C.P.L. § 440 Motion Ex. Q: Transcript of People v. Rodriguez, et al., Indictment #3790/97 ["Rodriquez Tr."].) Rosa testified that in October 1996 he was arrested, indicted, pleaded guilty and was released on bail in connection with the shooting of Jehu Morales. (Rodriguez Tr. 1522-24, 1552-53, 1557-59.) He was arrested in connection with a hit-and-run in Queens in November 1996, prior to his sentencing in the Morales case. (Rodriguez Tr. 1557-60.) According to Rosa, in December 1996, he had a court appearance in Manhattan that was adjourned when his attorney failed to appear. (Rodriguez Tr. 1564.) About a week later, Rosa was brought back to the Manhattan Courthouse and met with Assistant District Attorneys Hickey and Gagan for a "couple of hours." (Rodriguez Tr.

1565-67.) Rosa testified that he decided to cooperate with the District Attorney's Office as a result of that conversation, although he could not sign a cooperation agreement because his lawyer failed to appear on at least two occasions. (Rodriguez Tr. 1563, 1567-68.)

As to the night of Morales' shooting, Rosa testified that Skinner had a gun but did not shoot Morales. (Rodriguez Tr. 1518, 1542-43.) Rosa, Skinner, Wager, and "Erkel" were all present at Morales' shooting, and Erkel shot Morales. (Rodriguez Tr. 1515-18, 1543.) Rosa, Wager, and Skinner left together and were arrested, while Erkel "took a different . . . route." (Rodriguez Tr. 1519, 1543-44.) Rosa stated that when asked by the Manhattan District Attorney's office who Erkel was, Rosa told them he met Erkel through Skinner. (Rodriguez Tr. 1544-45.)

At Rosa's sentencing on September 27, 1989 for his role in the Morales shooting, Assistant District Attorney Hickey informed the judge that some time after Rosa's arrest in Queens, Rosa cooperated in an investigation that she was conducting on the Lower East Side. (Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Motion Ex. A: Rosa Ind. No. 4378/96 Sentencing Transcript ["Rosa S."] 3-5.) A.D.A. Hickey stated that after his Queens indictment, Rosa

> basically cooperated in an investigation that I was conducting on the Lower East Side. He testified in the grand jury [in] which he was active in the indictment of almost 40 people. He also testified at the trial of four of those defendants which led to their conviction. The extent of the promise that the People made are as follows: We discussed this case with the Queens District Attorney, specifically the assistant who was assigned to that case. No promises were made in terms of a lesser plea. My supervisor, Walter Arsenault, did speak to the Judge in Queens who presided over that case and informed that Judge of the extent of Anibal Rosa's cooperation . . . . I told Mr. Rosa I would tell your Honor that the extent of cooperation was considerable and I believe as fully as he could provide or was able to provide at the time. . . . We promised him in exchange for this we would inform you of these facts and recommend in light of the cooperation he [be] sentenced to one and a half to four and a half on this indictment and if you thought it appropriate to run concurrent with the sentence he's currently serving [on the Queens charges.]

(Rosa S. 3-5.)

This information is consistent with Assistant District Attorney Gagan's statement during Skinner's trial that Rosa was not cooperating "in this case." (See pages 36-38 above.) Presumably, at the time of Skinner's trial, the District Attorney's Office was trying to secure Rosa's cooperation for the case involving the forty-person indictment, which was eventually secured, according to A.D.A. Hickey (Rosa S. 3-5.)

D. Application of the Brady Standard to Skinner's Claim

1. Rosa's Information that Skinner Was Present But Was Not the Shooter Would Not Have Exculpated Skinner

These transcripts are not the "smoking gun" Skinner portrays them to be. Even in light of Rosa's testimony at the Rodriguez trial and A.D.A. Hickey's discussion of Rosa's cooperation at Rosa's September 1999 sentencing, Skinner's Brady claim fails on the merits.

First, assuming that Rosa told the District Attorney's Office a version of the Morales shooting consistent with his testimony at the Rodriguez trial (see pages 38-39 above), that information is not Brady material because it would not in any way have exculpated Skinner. Rosa's description of the events surrounding the Morales shooting inculpates Skinner by describing Skinner's presence with a gun and connecting Skinner to "Erkel," who Rosa testified shot Morales. (Tr. 1516-17, 1522, 1545.) Skinner highlights the fact that Rosa informed the prosecutor that someone other than Skinner shot Morales (Dkt. No. 17: Skinner 7/12/01 C.P.L. § 440 Motion at 36), but fails to recognize that Rosa's version entirely refutes Skinner's alibi defense.

Skinner further asserts that "[h]ad the People revealed [Rosa's identification of the shooter] it would not have cleared [Skinner] but it would have revealed the People's theory of this shooting was fabricated by ADA Gagan. . ." (Skinner 7/12/01 C.P.L. § 440 Motion at 36.) In fact,

the State prosecuted Skinner under an "acting in concert" theory. (Charge: Tr. 1741-44) ("It's the theory of the People's case that the defendant acted in concert with Anibal Rosa and Anthony Wager and others in the commission of counts 1 through 7 of the indictment. Accordingly, the legal principle of acting in concert, which is sometimes referred to as aiding and abetting, applies to those counts.") The prosecutor himself stated that "the fact is [that Skinner is] not charged as the shooter in this case." (State Summation: Tr. 1701.) Because Rosa's version of the events, including the naming of the shooter, would not have exculpated Skinner nor contradicted the prosecution's theory of the case, it fails to qualify as Brady material. See, e.g., United States v. Gonzalez, 110 F.3d 936, 944 (2d Cir. 1997) (where "defendants' theory was that only [police officer] fired a weapon. . . [alleged Brady] evidence suggesting no shots were fired plainly would have undermined, rather than supported, that theory." Further, "the charge against defendants was not that they fired their weapons, but that they possessed them."); United States v. Pimentel, No. 99 CR 1104, 2002 WL 1208679 at *4 (E.D.N.Y. May 30, 2002) (Brady claim rejected where, inter alia, suppressed information implicated defendant in the crime and did not undermine the government's theory of the case); cf. Mendez v. Artuz, 303 F.3d 411, 414 (2d Cir. 2002) ("Suppressed information is exculpatory and thus 'favorable' to the defense for Brady purposes when it directly contradicts the motive theory testified to by prosecution witnesses.").

Second, information provided by Rosa, such as the identity of the shooter, cannot be properly analyzed as Brady material because Rosa's identity or existence was not "suppressed" by the government. Skinner and his counsel were surely aware that Rosa, who was arrested and charged along with Skinner and Wager, might have relevant information about the crime with which Skinner,

Rosa, and Wager were charged. At least as to the identity of the shooter, Skinner's Brady claim fails on this ground because the State in no way deprived Skinner's counsel of interviewing or calling Rosa at trial. In fact, A.D.A. Gagan stated on the record that he "would produce [Rosa] for Ms. Stewart to call him as a witness if she would like." (Tr. 697.) To the extent the State had any Brady obligation as to Rosa's version of events (as opposed to the existence of a cooperation agreement), the State met its obligation by offering to make Rosa available to testify. See, e.g., United States v. Torres, 129 F.3d 710, 717 (2d Cir. 1997) ("It is well settled that evidence 'is not considered to have been suppressed within the meaning of the Brady doctrine if the defendant or his attorney either knew, or should have known of the essential facts permitting him to take advantage of [that] evidence.'") (quoting United States v. Gonzalez, 110 F.3d 936, 944 (2d Cir. 1997)); United States v. Campos, No. 95-1377, 100 F.3d 945 (table), 1996 WL 83166 at *1 (2d Cir. Feb. 26, 1996) ("Even if [witness's] failure to identify [defendant] in a photospread constituted Brady material, the defense's opportunity to interview [the witness] – and its failure to call [the witness] . . . at trial – eliminates any possibility of prejudice."), cert. denied, 518 U.S. 1027, 116 S. Ct. 2569 (1996); United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995) ("[E]vidence is not considered to have been suppressed within the meaning of the Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of [that] evidence.") (internal quotes omitted), cert. denied, 516 U.S. 1165, 116 S. Ct. 1056 (1996); Busiello v. McGinnis, 235 F. Supp. 2d 179, 190 (E.D.N.Y. 2002) ("The Second Circuit has explained that Brady is inapplicable 'if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'"); United States v. Fasciana, 01 Cr.

00058, 2002 WL 31495995 at *1 (S.D.N.Y. Nov. 6, 2002) ("In most circumstances, the 'Government may fulfill its Brady obligation by directing the defendant's attention to witnesses who may have exculpatory evidence. Once the defendant is made aware of the existence of such witnesses, he may attempt to interview them to 'ascertain the substance of their prospective testimony,' or subpoena them if the Government does not intend to call them as witnesses at trial.'").

2. Rosa's Alleged Cooperation Agreement Was Not Material Impeachment Evidence Since Rosa Did Not Testify at Skinner's Trial

Assuming arguendo that at the time of Skinner's trial Rosa had a cooperation agreement with the District Attorney's Office (specifically relating to Skinner's case) and the prosecutor improperly withheld this fact from Skinner and his counsel, Skinner's Brady claim still fails because a cooperation agreement with Rosa was not material to Skinner's trial.

The Supreme Court has emphasized four aspects of materiality. First, "[a]lthough the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1565-66 (1995) (citing, inter alia, United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3380, 3383 (1985)).[27/] Thus, non-disclosed "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936,

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[27/] Accord, e.g., Tankleff v. Senkowski, 135 F.3d 235, 250 (2d Cir. 1998); Mendez v. Artuz, 98 Civ. 2652, 2000 WL 722613 at *12 (S.D.N.Y. June 6, 2000) (Peck, M.J.), report & rec. adopted, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), aff'd, 303 F.3d 411 (2d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); Hoover v. Leonardo, No. 91-CV-1211, 1996 WL 1088204 at *3 (E.D.N.Y. June 11, 1996).

1948 (1999) (quoting United States v. Bagley, 473 U.S. at 682, 105 S. Ct. at 3383) (emphasis added).[28/] The "touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. at 434, 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. at 678, 105 S. Ct. at 3381).[29/]

Second, the sufficiency of the evidence is not the touchstone of materiality:

> The second aspect of . . . materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

[28/] Accord, e.g., Kyles v. Whitley, 514 U.S. at 433-34, 115 S. Ct. at 1565; United States v. Maisonet, No. 00-1488, 45 Fed. Appx. 74, 76, 2002 WL 31060361 at *1 (2d Cir. Sept. 17, 2002); Mendez v. Artuz, 2000 WL 722613 at *12.

[29/] See also, e.g., Strickler v. Greene, 527 U.S. at 289-90, 119 S. Ct. at 1953; United States v. Diaz, 176 F.3d 52, 108 (2d Cir.), cert. denied, 528 U.S. 875, 120 S. Ct. 181 (1999); Tankleff v. Senkowski, 135 F.3d at 250; United States v. Amiel, 95 F.3d 135, 144-45 (2d Cir. 1996); United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1994), cert. denied, 516 U.S. 1165, 116 S. Ct. 1056 (1996); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir.), cert. denied, 488 U.S. 890, 109 S. Ct. 224 (1988); Mendez v. Artuz, 2000 WL 722613 at *12; Orena v. United States, 956 F. Supp. 1071, 1092 (E.D.N.Y. 1997) (Weinstein, D.J.); Hoover v. Leonardo, 1996 WL 1088204 at *3.

Kyles v. Whitley, 514 U.S. at 434-35, 115 S. Ct. at 1566.[30] "This means that the omission must be evaluated in the context of the entire record." United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402 (1976); accord, e.g., Mendez v. Artuz, 2000 WL 722613 at *12.[31]

Third, once constitutional error has been established there is no need for harmless error review, since "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different' . . . necessarily entails the conclusion that the suppression must have had '"substantial and injurious effect or influence in determining the jury's verdict."'" Kyles v. Whitley, 514 U.S. at 435, 115 S. Ct. at 1566.[32]

Fourth, in determining materiality, the "suppressed evidence [is] considered collectively, not item by item." Kyles v. Whitley, 514 U.S. at 437, 115 S. Ct. at 1567.[33]

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[30] Accord, e.g., Strickler v. Greene, 527 U.S. at 290, 119 S. Ct. at 1952; Mendez v. Artuz, 2000 WL 722613 at *12; Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

[31] "'If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses . . . had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glance, the result might well be different.'" United States v. Agurs, 427 U.S. at 113 n.21, 96 S. Ct. at 2402 n.21; accord, e.g., Mendez v. Artuz, 2000 WL 722613 at *12.

[32] Accord, e.g., Mendez v. Artuz, 2000 WL 722613 at *13; Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

[33] Accord, e.g., United States v. Persico, 164 F.3d 796, 805 (2d Cir.), cert. denied, 120 S. Ct. 171 (1999); Mendez v. Artuz, 2000 WL 722613 at *13; Orena v. United States, 956 F. Supp. at 1092; Hoover v. Leonardo, 1996 WL 1088204 at *3.

"Suppressed impeachment evidence is 'material if the witness whose testimony is attacked supplied the only evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.'" United States v. Diaz, 176 F.3d at 108 (quoting United States v. Wong, 78 F.3d 73, 79 (2d Cir. 1996)).[34/]

Here, since Anibal Rosa did not testify at Skinner's trial and Skinner's counsel thus had no opportunity to impeach him, the existence of a cooperation agreement between Rosa and the District Attorney's office was not material. See, e.g., United States v. Shandorf, No. 01-1047, 20 Fed. Appx. 50, 53, 2001 WL 1178797 at *2 (2d Cir. Oct. 3, 2001) (information regarding government agent not material under Brady where agent "was not a witness at trial" and defendant "could not have permissibly called [him] as a hostile witness for the sole purpose of impeaching him."); Mesterino v. United States, 96 Civ. 2114, 90 Cr. 276, 1997 WL 528047 at *4 n.6 (S.D.N.Y. Aug. 27, 1997) (Rejecting defendant's claim that the government improperly withheld the existence

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[34/] Accord United States v. Avellino, 136 F.3d 249, 256-57 (2d Cir. 1998); United States v. White, Nos. 95-1567, 96-1091, 95-1696, 96-1083, 113 F.3d 1230 (table), 1997 WL 279972 at *12 (2d Cir. 1997) ("Because [witness's] testimony was not the only evidence linking [defendant] to the crime, impeachment material against him was not material."), cert. denied, 523 U.S. 1085, 118 S. Ct. 1539 (1998); Busiello v. McGinnis, 235 F. Supp. 2d 179, 191 (E.D.N.Y. 2002) (Impeachment evidence is material under Brady if the witness to be impeached "'supplied the only evidence linking the defendant to the crime,' or 'if the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.'"); Shabazz v. Artuz, No. 97 CV 1704, 2002 WL 873319 at *3 (E.D.N.Y. Apr. 29, 2002) ("Impeachment evidence, such as the existence of cooperation agreements or promises, may be material where the witness in question supplies the only evidence linking the defendant to the crime."); Lyon v. Senkowski, 109 F. Supp. 2d 125, 139 (W.D.N.Y. Aug. 7, 2000) ("Since [witness's] testimony did not directly link [petitioner] to the crime or provide an essential element of the offense, evidence impeaching him would not have been material under Brady.").

of a cooperation agreement with informant because informant's "statements were not offered as evidence, and therefore no testimony existed for the defense to impeach. Since the Government neither called [the informant] to testify nor presented his hearsay testimony for its truth, any cooperation agreement between the Government and [the informant] was irrelevant to the issues at trial.").[35/]

Nor would any cooperation agreement have been material impeachment evidence to attack the credibility of Rosa's mother, aunt, and sister who testified at Skinner's trial. Anibal Rosa's aunt, Edith Miriam Velasquez, testified that she heard shots, looked out the window, saw Will Rodriquez fall to the ground and called the police; Anibal Rosa came to the scene shortly thereafter and "went crazy because [Rodriguez] was his friend" and started to cry. (Velasquez: Tr. 647-48.) Velasquez drove Rosa to the hospital, where they learned that Rodriguez was dead. (Velasquez: Tr. 650.) Velasquez testified that when they went outside, she saw Skinner and others. (Velasquez: Tr. 650-51.) Velasquez also testified that some time after Morales' shooting she overheard Skinner tell

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[35/] See also, e.g., Walker v. True, No. 02-22, 2003 WL 21008657 at *10 (4th Cir. May 6, 2003) (statements to detective could not be characterized as impeachment evidence because declarant did not testify); United States v. Williams, 954 F.2d 668, 672 (11th Cir. 1992) ("The law is clearly established that one may not introduce evidence to impeach a witness who does not testify."); cf. United States v. Sanchez, 118 F.3d 192, 196-97 (4th Cir. 1997) (District court did not abuse its discretion in limiting defendant's cross-examination of government agents regarding informant's cooperation agreement where informant "did not testify against [defendant]; the government did not call [the informant] as a witness and, . . . [defendant] also did not call him to testify. Therefore, [the informant's] general dishonesty and credibility, to which details of his cooperation might be relevant, were not at issue in this case."); Marino v. Miller, No. 97-CV-2001, 2002 WL 2003211 at *6-7 (E.D.N.Y. Aug. 22, 2002) (Where witness did not testify about the identification procedure at trial, information prosecution allegedly withheld about the procedure would not have been impeachment material because "there was no opportunity for [petitioner] to impeach [the witness] with the alleged inconsistency.").

her nephew Rosa that Skinner tossed his gun onto a second floor roof. (Velasquez: Tr. 668.) Skinner's counsel asked Velasquez "do you believe that your testimony here today will help your nephew in some way?," and Velasquez responded that she was "just saying the truth, that's what's important." (Velasquez: Tr. 687.)

Following Velasquez's testimony, outside the jury's presence, Skinner's counsel raised the issue of whether Anibal Rosa had a cooperation agreement (Tr. 695-701; see pages 36-37 above), and the judge noted that he had allowed defense counsel to question Velasquez about her knowledge of any cooperation agreement:

> The Court: But let the record also reflect that at the sidebar I suggested, and you took my suggestion, that you ma[k]e an inquiry of this witness [Velasquez] as to whether her testimony may be influenced by a desire to benefit her nephew. That was put to the witness, and the only crucial thing with regard to that witness would be that question, if she was unaware of a cooperation agreement it would have been no benefit to you during cross-examination of her. . . .
>
> Ms. Stewart: I asked her if her testimony would benefit him. Her answer was along the lines [of], "I'm only here to tell the truth."
>
> . . .
>
> That doesn't necessarily mean her testimony isn't intended to benefit him. . . .
>
> The Court: That's true.
>
> . . .
>
> Well, for whatever reason, Ms. Stewart, you elected not to follow-up on that question.
>
> . . .

> [A.D.A.] Gagan: I want the record to reflect that I never discussed Anibal Rosa's case with this witness, Ms. Velasquez. I wouldn't do that, and I don't do that, and he's not under a cooperation agreement. He's not being called.

(Tr. 698-701.)

Anibal Rosa's sister, Brenda Rosa, and his mother, Manerva Rosa, provided rebuttal evidence to Skinner's character witnesses.[36/] When Skinner's counsel asked Brenda Rosa if she thought that her "testimony here today in anyway may help [her brother Anibal] at this time?" Brenda Rosa responded, "[n]o . . . [n]ot at all. He's already doing his time; it has nothing to do with today." (B. Rosa: Tr. 1563.) Brenda Rosa stated that although her brother had not yet been sentenced, it was her "belief" that he would be sentenced to "one and a half to four and a half" years based on "[t]he plea that [Anibal Rosa]" copped, "an agreement that was done way before." (B. Rosa: Tr. 1563-64.) Upon the court's questioning, Brenda Rosa confirmed that Anibal Rosa had a plea agreement in the case involving Skinner and was aware that her brother "could get more time because of what happened to him" after the agreement was made. (Rosa: Tr. 1564-65.) On re-direct, Assistant District Attorney Gagan clarified that the agreement Brenda Rosa referred to, under which Anibal Rosa would be sentenced to one and a half to four and a half years, was not with the District Attorney's Office but rather with Judge Altman. (Rosa: Tr. 1570-72.) Brenda Rosa testified that her brother Anibal was not currently talking to the District Attorney's Office, but she was unsure if he had in the past. (Rosa: Tr. 1572.)

None of these witnesses supplied the only evidence linking Skinner to the crime, nor would the likely impact on the witnesses' credibility have undermined a critical element of the

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[36/] No mention of a cooperation agreement was made during the testimony of Manerva Rosa, Rosa's mother. (M. Rosa: Tr. 1574-81.)

prosecution's case. See, e.g., United States v. Diaz, 176 F.3d at 108. Brenda and Manerva Rosa's testimony was limited to Skinner's reputation for violence, in rebuttal to defense witness's testimony about his reputation for peacefulness. Neither witness' testimony referred to an element of any of the crimes with which Skinner was charged. Even if these witnesses had been completely discredited by Anibal Rosa's cooperation agreement or otherwise, the impact on their credibility would not have undermined a critical element of the State's case, given the corrobative testimony of eyewitnesses Juan Rivera, Dominick Rosado, and the victim himself, Jehu Morales.

In conclusion, the Court sees no reasonable probability that the result of Skinner's trial would have been different had the State disclosed Anibal Rosa's (alleged) cooperation agreement with the District Attorney's Office.

3. Skinner's Claim that Police Reports Were Withheld is a Rosario Claim Not Cognizable on Habeas Review, But Even If Considered a Brady Claim, it is Too Speculative

Skinner's petition alleges that "the prosecutor never turned over any of the DD'5 reports or police memo's for the arresting detectives under indictments #4378/96 and #8190/96." (Dkt. No. 1: Pet. ¶ 12(C).) Aside from a conclusory assertion that the missing reports "surely would have contradicted these witnesses under cross-examination" (Dkt. No. 19: Traverse at 9), Skinner does not allege that the reports would have been material impeachment or exculpatory evidence

under Brady. As a result, he is essentially raising violation of New York's Rosario rule,[37/] which is not cognizable on habeas review.

While the Brady rule that due process requires prosecutors to provide materially exculpatory evidence to the defense (see pages 34-35 above) and New York's Rosario rule, requiring disclosure of witness statements in criminal cases, overlap considerably, they are not identical. See, e.g., Landy v. Costello, No. 97-2433, 141 F.3d 1151 (table), 1998 WL 105768 at *1 (2d Cir. Mar. 9, 1998) (Rosario obligations arise solely under state law); Pena v. Fischer, 00 Civ. 5984, 2003 WL 1990331 at *10 (S.D.N.Y. Apr. 30, 2003) ("'[F]ederal courts have consistently held that Rosario claims are not subject to federal habeas corpus review because they arise exclusively under state law."); Bynum v. Duncan, 02 Civ. 2124, 2003 WL 296563 at *9 n.5 (S.D.N.Y. Feb. 12, 2003) (Rosario claims are not cognizable on habeas review); Gumbs v. Kelly, 97 Civ. 8755, 2000 WL 1172350 at *6 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.) (& cases cited therein); Sutherland v. Walker, 97 Civ. 4432, 1999 WL 1140870 at *9 (S.D.N.Y. Dec. 10, 1999) (a prosecutor's failure to turn over "Rosario material," unlike failure to provide Brady material, is not reviewable by a federal habeas court); Green v. Artuz, 990 F. Supp. 267, 274 (S.D.N.Y. 1998) ("[F]ailure to turn over Rosario material is not a basis for habeas relief as the Rosario rule is purely one of a state law"); Bernard v. Stinson, 97 Civ. 1873, 1998 WL 40201 at *4 (S.D.N.Y. Jan. 30, 1998); Copes v. Schriver, 97 Civ.

[37/] People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, cert. denied, 368 U.S. 866, 82 S. Ct. 117 (1961). The Rosario rule has been codified at C.P.L. § 240.45(1) (a), which provides:

> [T]he prosecutor shall . . . make available to the defendant: (a) Any written or recorded statement, including any testimony before a grand jury and an examination videotaped pursuant to section 190.32 of this chapter, made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony[.]

2284, 1997 WL 659096 at *4 (S.D.N.Y. Oct. 22, 1997) (Rosario violation does not establish a constitutional violation); Morrison v. McClellan, 903 F. Supp. 428, 429 (E.D.N.Y.1995) ("Any error under Rosario at trial would be a violation of state law, and, thus, not subject to review under a petition for a writ of habeas corpus.").

Even if the Court were to construe Skinner's Rosario claim as a Brady claim, it would fail because he provides no evidence to support his allegations.[38/] See, e.g., United States v. Love,

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[38/] Skinner's appellate counsel aptly explained the weakness in Skinner's Rosario claim to him:

> As for the Rosario-withheld DD5's claim, you have not raised this issue in a way that I can pursue it on appeal. A viable claim must make some showing that a specific document was withheld and that the failure to turn over the document prejudiced you. I have read through your 440 and 330 papers several times. I do not see any clear allegation that any specific DD5's were withheld from you . . . .
>
> If you continue to believe there is a Rosario violation in your case, you must try a FOIL request and if you come up with some withheld document, then do another 440 and argue how the withheld document prejudiced you.
>
> However, it is entirely possible that once the first indictment was pending that the police and or trial assistant stopped writing down what Morales and the others were saying to them during interviews and that is why there is no additional DD-5 for the second indictment. As long as that is possible, the court will not assume from the lack of documents that some document out there is being withheld from you.
>
> For this reason, I am not planning to add anything to the brief regarding withheld DD5's.

(Dkt. No. 17: Skinner C.P.L. § 460.15 Motion to 1st Dep't, Ex. A: 8/2/99 Letter from Appellate Counsel to Skinner.)

Skinner points to a response to one of his many FOIL requests, which shows that DD5s for Rosado and Rivera could not be located and that the DD5 for Jehu Morales was "denied in that release of such would endanger the life and safety of any person." (Dkt. No. 19: Traverse Ex. X: 9/12/02 Police Dep't Legal Bureau FOIL Response.) The absence of a report, however, is not evidence that any report was improperly withheld from Skinner.

No. 02-2953, 2003 WL 1796009 at *2 (7th Cir. Mar. 27, 2003) ("[A]ny Brady claim would be speculative and therefore frivolous [where] there is no evidence in the record that the prosecution suppressed [police] reports or that they even existed."); Chandras v. McGinnis, No. 01 Civ. 2519, 2002 WL 31946711 at *5 (E.D.N.Y. Nov. 13, 2002) ("In the absence of credible evidence contradicting the ADAs' denials" that a cooperation agreement existed, petitioner's Brady claims denied as meritless.); Ferguson v. Walker, 00 Civ. 1356, 2002 WL 31246533 at *13 (S.D.N.Y. Oct. 7, 2002) (Swain, D.J. & Peck, M.J.) (Petitioner's "claim of withheld Brady material is without evidence and speculative and must be rejected.") (citing cases); Cruz v. Artuz, No. 97-CV-2508, 2002 WL 1359386 at *14 (E.D.N.Y. June 24, 2002) (Brady claim dismissed as "speculative, conclusory, and unsupported" where there was "nothing in the record, nor does [petitioner] proffer anything, to suggest that the [allegedly suppressed] statements exist."); Palmer v. Senkowski, 99 Civ. 9634, 2002 WL 54608 at *7 (S.D.N.Y. Jan. 15, 2002) (where the record contained no evidence of an undisclosed agreement with prosecution witness, "failure to disclose the alleged agreement cannot serve as a ground for habeas relief."); United States ex rel. Whitehead v. Page, No. 96 C 5013, 2000 WL 343209 at *17 (N.D. Ill. Mar. 30, 2000) (Petitioner "fails to present this court with any proof that the prosecution withheld evidence; rather, he merely speculates that there was other evidence. Mere speculation is not enough to show a Brady violation."), aff'd, 263 F.3d 708 (7th Cir. 2001), cert. denied, 534 U.S. 1116, 122 S. Ct. 927 (2002); Franza v. Stinson, 58 F. Supp. 2d 124, 154 (S.D.N.Y.

July 1, 1999) (Peck, M.J.) (Petitioner's "claim of withheld Brady material is speculative, conclusory and unsupported, and thus must be rejected.").[39/]

Accordingly, Skinner's Brady habeas claims are without merit and should be denied.

IV. SKINNER'S DOUBLE JEOPARDY HABEAS CLAIM SHOULD BE DENIED BECAUSE HE HAS FAILED TO REBUT THE STATE COURT'S FINDING THAT THE INDICTMENTS WERE PROPERLY JOINED

Skinner's habeas petition alleges that he was subjected to Double Jeopardy in violation of the Fifth Amendment because "[t]he People presented the matter under indictment #8109/96 to a grand jury with perjured false testimony and when defense counsel on September 30,

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[39/] See also, e.g., United States v. Walker, No. 94-CR-328, 1998 WL 760260 at *3-4 (N.D.N.Y. Oct. 30, 1998) (denying defendant's motion for a new trial based upon withholding of Brady evidence, because "[d]efendant's claim of prosecutorial misconduct based on allegations that the government withheld material evidence . . . is speculative"); Harris v. United States, 9 F. Supp. 2d 246, 275 (S.D.N.Y. 1998) (denying petitioner's § 2255 habeas petition based upon withheld evidence because "the government does not bear the burden of establishing that documents were not withheld; it is [petitioner's] burden to prove that the government failed to disclose evidence favorable to [petitioner]. Conclusory allegations that the government 'suppressed' or 'concealed' evidence do not entitle [petitioner] to relief.") (citations omitted); United States v. Upton, 856 F. Supp. 727, 746 (E.D.N.Y. 1994) ("As a matter of law, mere speculation by a defendant that the government has not fulfilled its obligations under Brady v. Maryland . . . is not enough to establish that the government has, in fact, failed to honor its discovery obligations. . . . The government is under no obligation to turn over that which it does not have."); Shuman v. Wolff, 543 F. Supp. 104, 110 (D. Nev. 1982) ("Petitioner . . . baldly asserts, without any additional support or argument, that his conviction was obtained due to the prosecution's failure to provide him favorable evidence (i.e., Brady material) after a timely request for discovery was made. Where a habeas petitioner does not identify or otherwise at least generally specify what evidence was allegedly wrongfully withheld, no relief is available on those grounds."); United States ex rel. Jiggetts v. Follette, 308 F. Supp. 468, 471 (S.D.N.Y 1970) (dismissing § 2255 habeas petitioner's Brady violation claim because "[p]etitioner is engaging in mere unsupported speculation. There is a total lack of any support for his contention that the prosecution suppressed evidence favorable to petitioner and material to the question of his guilt."), aff'd, 446 F.2d 114 (2d Cir. 1971).

1996 revealed before the court that all the complaining witnesses were in fact incarcerated at the time of the alleged threats the People dismissed the matter 11 days later but never released this petitioner and thereafter consolidated the two indictments for trial." (Dkt. No. 1: Pet.¶ 12(D).)

Skinner first raised this Double Jeopardy claim in his July 1997 C.P.L. § 440 motion, alleging that indictment number 8190/96 was dismissed before trial and therefore improperly joined with indictment number 4378/96. (Pet. Ex. C: Skinner 7/12/97 C.P.L. § 440 Aff. ¶¶ 5, 8.) With this C.P.L. § 440 motion, Skinner included, inter alia, (1) an incorrect (and later corrected) version of his rap sheet, dated January 24, 1997, listing indictment 8190/96 as having been "dismissed" (Pet. Ex. C: 1/24/97 Rap Sheet at 8) and "sealed upon termination of criminal action in favor of the accused CPL 160.50" on October 15, 1996 (1/24/97 Rap Sheet at 9); (2) a certificate from the Clerk of the New York Supreme Court, dated April 14, 1997, regarding indictment number 8190/96 and stating that "on February 21, 1997, [Skinner] was tried and found guilty to the crime of tampering with a witness in the fourth degree . . . and found not guilty to the crimes of intimidating a witness in the third degree . . . " (Pet. Ex. C: Miscellaneous Certificate No. 13867); (3) an April 18, 1997 letter to Skinner from the New York County Supreme Court stating that the "Division of Criminal Justice Services has been notified to correct the information recorded on [Skinner's] rap sheet for indictment numbers 8151-96 and 8190-96" (Pet. Ex. C: 4/18/97 Sup. Ct. N.Y. Co. Letter); and (4) an amended rap sheet, dated May 14, 1997, listing Skinner as "convicted upon a plea of guilty" of fourth-degree tampering with a witness and "acquitted" of third degree intimidation of a witness for indictment number 8190/96 on February 21, 1997 (Pet. Ex. C: 5/14/97 Rap Sheet).

The trial court summarily denied Skinner's C.P.L. § 440 motion in an order entered on September 22, 1997. (Dkt. No. 16: Israel Aff. Ex. C: 9/22/97 Order.) Skinner's C.P.L. § 440 motion appeal was consolidated with his direct appeal. (See pages 12-13 above.) The First Department upheld the trial court's denial of Skinner's C.P.L. § 440 motion, holding that Skinner's "motion to vacate judgment was properly denied (see, CPL 440.30 [4][d])." People v. Skinner, 269 A.D.2d 202, 203, 704 N.Y.S.2d 18, 20 (1st Dep't 2000) (quoted at pages 14-15 above).

C.P.L. § 440.30(4)(d) provides that "[u]pon considering the merits of the motion, the court may deny it without conducting a hearing if . . . [a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true." C.P.L. § 440.30(40(d).

There is a split of authority within the Second Circuit as to whether denial of a motion pursuant to C.P.L. § 440.30(4)(d) is an "independent and adequate" state procedural bar. Some district court decisions in the Second Circuit have treated the denial of a § 440 motion pursuant to § 440.30(4)(d) as a procedural bar to habeas review. E.g., Marsh v. Ricks, 02 Civ. 3449, 2003 WL 145564 at *6-7 & n.7 (S.D.N.Y. Jan. 17, 2003) ("[B]ecause the denial of a motion to vacate a conviction pursuant to [C.P.L.] § 440.30(4) constitutes reliance on an independent and adequate state law ground, our review of petitioner's claim is barred by this procedural default absent a showing of a valid excuse.") (citing Roberts v. Scully, 875 F. Supp. 182, 193 n.7 (S.D.N.Y.), aff'd, 71 F.3d 406 (2d Cir. 1995)); Ahmed v. Portuondo, No. 99 CV 5093, 2002 WL 1765584 at *1-2 (E.D.N.Y.

July 26, 2002) (Where "trial court, on the CPL § 440 motion, . . . relied on the adequate and independent state ground that petitioner failed to support [his] claim with any evidence or sworn affidavits beyond his own," citing C.P.L. § 440.30(4)(d), petitioner's habeas claim "is subject to a procedural bar."); Barton v. Walker, 99 Civ. 12016, 2001 WL 262692 at *3 (S.D.N.Y. Mar. 15, 2001) (preliminary finding that petitioner's claim procedurally barred where state court denied claim as "'unsupported beyond the conclusory allegations offered by the defendant' . . . pursuant to CPL § 440.30(4)(d)."); Dunavin v. Leonardo, No. 95-CV-296, 1997 WL 151771 at *12 (N.D.N.Y. Mar. 31, 1997) (Pooler, D.J.) (state court's denial of claim with citation to C.P.L. § 440.30(4)(d) "constitutes the invocation of a procedural bar to a petitioner's [habeas] claims.").[40/]

Other decisions, however, disagree and find that denial pursuant to C.P.L. § 440.30(4)(d) is a decision on the merits. E.g., Lou v. Mantello, No. 98-CV-5542, 2001 WL 1152817 at *9 n.9 (E.D.N.Y. Sept. 25, 2001) (claims rejected pursuant to §§ 440.30(4)(b) and 440.30(4)(d) were not procedurally barred; state's argument that the § 440 court's denial was based on an adequate and independent state ground was "based on an erroneous interpretation of [these

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[40/] See also, e.g., Pachay v. Strack, No. 94-CV-3169, 1995 WL 479708 at *4 (E.D.N.Y. Aug. 4, 1995) (Where Appellate Division denied petitioner's § 440 claims "because they were 'unsupported by any other affidavit or evidence' . . . . [and] explicitly invoked § 440.30(4)(d) as a bar to petitioner's claims . . ., these claims are procedurally barred."); cf. Shaw v. Artuz, 99 Civ. 9754, 2001 WL 1301735 at *3-4 (S.D.N.Y. Oct. 19, 2001) (Petitioner procedurally defaulted his claim by failing to comply with C.P.L. § 440.30(4)(b), "which requires appellants to support their allegations with sworn statements. By failing to conform with this state procedural rule, [petitioner] defaulted this claim. Indeed, the state court clearly and expressly barred his claim under New York law for that reason."); White v. Keane, 00 Civ. 6202, 2001 WL 699053 at *2 (S.D.N.Y. June 21, 2001) ("a violation of [C.P.L. § 440.30(4)(b)] would create a procedural bar"); Roberts v. Scully, 875 F. Supp. at 192-93 n.9 (denial under § 440.30(4)(b) due to inadequacy of petitioner's papers would be an independent and adequate state law ground).

sections], which in fact provide that a trial court may deny a motion to vacate a judgment of conviction only 'upon considering the merits.'") (collecting cases); Ortiz v. Keohane, No. 94-CV-0124, 1995 WL 669904 at *4 n.5 (E.D.N.Y. Nov. 5, 1995) (same); Muhammad v. Kirk, 90 Civ. 1667, 1993 WL 37502 at *4 & n.5 (S.D.N.Y. Feb. 8, 1993); see also Smart v. Scully, 787 F.2d 816, 820 (2d Cir. 1986) (state court's denial of pro se defendant's § 440 motion for failure to comply with § 440.30 by omitting sworn allegations was not "'an adequate and independent state ground' warranting a federal habeas court's refusal to consider the underlying federal issues").

The Court agrees with the reasoning of Judge Gleeson's decision in Lou v. Matello, 2001 WL 1152817 at *9 n.9, that because C.P.L. § 440.30 refers to the procedures for deciding C.P.L. § 440 motions, and C.P.L. § 440.30(4) specifically states that "[u]pon considering the merits of the motion, the court may deny it without conducting a hearing" if certain conditions exist, that is a merits based decision, not a procedural bar. Indeed, the fact that C.P.L. § 440.30(3) requires a court to grant a C.P.L. § 440 motion without a hearing if certain requirements are met strongly suggests that C.P.L. § 440.30(4)'s provisions are not procedural. The Court therefore turns to the merits of Skinner's claim.[41/]

[41/] Cf., Jones v. Spitzer, 01 Civ. 9754, 2003 WL 1563780 at *46 (S.D.N.Y. Mar. 26, 2003) ("Some case law suggests that a violation of CPL § 440.30(4)(b) 'create[s] a procedural bar,' and thus precludes habeas relief . . . However, because there is [other] authority holding that the denial of a claim based on CPL § 440.30(4)(b) fails to constitute an adequate and independent state ground," court reviewed claim on the merits.); Palmer v. Senkowski, 99 Civ. 9634, 2002 WL 54608 at *8 n.2 (S.D.N.Y. Jan 15, 2002) (Noting disagreement among district courts on whether § 440.30(4)(d) is a procedural bar, habeas court found it "unnecessary to determine if [denial under § 440.30(4)(b)] is an independent and adequate state procedural ground" because petitioner's claim lacked merit.).

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This prohibition applies to state prosecutions through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).[42/]

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. at 717, 89 S. Ct. at 2076 (fn. & citations omitted).[43/]

The provision "serves principally as a restraint on courts and prosecutors." Brown v. Ohio, 432 U.S. at 165, 97 S. Ct. 2225. "[T]he bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." Ohio v. Johnson, 467 U.S. at 498-99, 104 S.

[42/] Accord, e.g., Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2250 (1998); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989); Gumbs v. Kelly, 97 Civ. 8755, 2000 WL 1172350 at *14 (S.D.N.Y. Aug. 18, 2000) (Peck, M.J.); Morris v. Reynolds, 99 Civ. 5439, 1999 WL 1565179 at *9 (S.D.N.Y. Dec. 16, 1999) (Peck, M.J.), rev'd, 107 F. Supp. 2d 421 (S.D.N.Y. 2000) (Marrero, D.J.), rev'd, 264 F.3d 38, 51 (2d Cir. 2001), cert. denied, 536 U.S. 915, 122 S. Ct. 2381 (2002).

[43/] Accord, e.g., Monge v. California, 118 S. Ct. at 2250; Ohio v. Johnson, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540 (1984); Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977); Boyd v. Meachum, 77 F.3d 60, 63 (2d Cir.), cert. denied, 519 U.S. 838, 117 S. Ct. 114 (1996); United States v. LoRusso, 695 F.2d 45, 53 (2d Cir. 1982), cert. denied, 460 U.S. 1070, 103 S. Ct. 1525 (1983); Gumbs v. Kelly, 2000 WL 1172350 at *14; Morris v. Reynolds, 1999 WL 1565179 at *9.

Ct. at 2540. Importantly, the Double Jeopardy Clause "represents a constitutional policy of finality for the defendant's benefit in . . . criminal proceedings." United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554 (1971).[44/]

Pursuant to the AEDPA, "'a determination of a factual issue made by a State court shall be presumed to be correct [and t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.'" Boyette v. Lefevre, 246 F.3d 76, 88 (2d Cir. 2001) (quoting 28 U.S.C. § 2254(e)(1)).[45/] As the Second Circuit recently stated, a federal habeas court should

> review the state court's findings only to determine whether they were unreasonable in light of the evidence presented, 28 U.S.C. § 2254(d)(2), or whether the presumption that they are correct was rebutted by "clear and convincing" evidence, 28 U.S.C. § 2254(e)(1) . . . . In accordance with 28 U.S.C. § 2254, as modified by AEDPA, our review of the state court determinations of facts is limited to an inquiry into whether the conclusion of the state trial court was unreasonable based on the evidence presented and whether petitioner has presented evidence in the District Court that clearly and convincingly rebuts the presumption that the state court's factual findings are correct.

Channer v. Brooks, 320 F.3d 188, 195-96 (2d Cir. 2003); accord, e.g., Miller-El v. Cockrell, 123 S. Ct. 1029, 1041 (2003) ("Factual determinations by state courts are presumed correct absent clear and

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[44/] Accord, e.g., Brown v. Ohio, 432 U.S. at 165, 97 S. Ct. at 2225; see generally, e.g., Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223 (1957) ("[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."); Gumbs v. Kelly, 2000 WL 1172350 at *14; Morris v. Reynolds, 1999 WL 1565179 at *9.

[45/] Accord, e.g., Tibbs v. Greiner, 01 Civ. 4319, 2003 WL 1878075 *8 (S.D.N.Y. Apr. 16, 2003) (Peck, M.J.); Dickens v. Filion, 02 Civ. 3450, 2002 WL 31477701 at *10 (S.D.N.Y. Nov. 6, 2002) (Peck, M.J.), report & rec. adopted, 2003 WL 1621702 (S.D.N.Y. Mar. 28, 2003) (Cote, D.J.).

convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)."); Cotto v. Herbert, No. 01-2694, 2003 WL 1989700 at *10 (2d Cir. May 1, 2003) ("Under 28 U.S.C. § 2254(e)(1), the fact-findings of the trial court are subject to a 'presumption of correctness'. . . . On habeas review, the petitioner has the burden of 'rebutting the presumption of correctness by clear and convincing evidence.'") (citing 28 U.S.C. § 2254(e)(1)); Drake v. Portuondo, 321 F.3d 338, 345 (2d Cir. 2003) ("Under AEDPA, a state court's factual findings enjoy a presumption of correctness and may not be disturbed except upon a showing of 'clear and convincing evidence.'"); Davis v. Kelly, 316 F.3d 125, 127 (2d Cir. 2003) ("Under the AEDPA, we must accept [the state court's] finding of fact unless it is controverted by 'clear and convincing evidence.'").[46/]

[46/] See also, e.g., LanFranco v. Murray, 313 F.3d 112, 117 (2d Cir. 2002) ("In reviewing habeas petitions, we must presume the state court's findings of fact are correct, unless the petitioner meets 'the burden of rebutting th[is] presumption of correctness by clear and convincing evidence.") (brackets in original); Ponnapula v. Spitzer, 297 F.3d 172, 179 (2d Cir. 2002) ("We presume that the state court's factual findings are correct unless they are rebutted by clear and convincing evidence."); Yung v. Walker, 296 F.3d 129, 134 (2d Cir. 2002) ("We must presume the state court's factual findings to be correct and may overturn those findings only if petitioner offers clear and convincing evidence of their incorrectness."); Brown v. Artuz, 283 F.3d 492, 498 (2d Cir. 2002) ("[T]he AEDPA instructs that state court findings of fact 'shall be presumed correct,' rebuttable only upon a showing of 'clear and convincing evidence.'"); Tibbs v. Greiner, 2003 WL 1878075 at *8; Bynum v. Duncan, 02 Civ. 2124, 2003 WL 296563 at *6 (S.D.N.Y. Feb. 12, 2003) ("Under AEDPA, this Court must presume the state court's factual findings to be correct and may overturn those findings only if the petitioner offers clear and convincing evidence of their incorrectness."); Fabian v. Herbert, 00 Civ. 5515, 2003 WL 173910 at *5 (S.D.N.Y. Jan. 23, 2003) ("In reviewing state court factual determinations, the Court 'must apply a presumption of correctness . . . unless rebutted by clear and convincing evidence.'") (quoting Rodriguez v. Bennett, 98 Civ. 580, 1998 WL 765180 at *3 (S.D.N.Y. Nov. 2, 1998)); Marsh v. Ricks, 02 Civ. 3449, 2003 WL 145564 at *2 (S.D.N.Y. Jan. 17, 2003) ("State court fact findings underlying habeas claims enjoy a strong presumption of correctness that can only be rebutted by 'clear and convincing (continued...)

The First Department held that Skinner's motion was properly denied without a hearing under C.P.L. § 440.30(4)(d). People v. Skinner, 269 A.D.2d 202, 203, 704 N.Y.S.2d 18, 20 (1st Dep't 2000). That means that "[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence . . . " C.P.L. § 440.30(4)(d).

The factual allegation essential to Skinner's double jeopardy claim is whether indictment number 8190/96 was dismissed before it was consolidated with 4378/96. The First Department's reliance on C.P.L. § 440.30(4)(d) indicates that Skinner's allegation that indictment 8190/96 was dismissed was contradicted by a court record, such as Miscellaneous Certificate 13867 or Skinner's May 14, 1997 Amended Rap Sheet (Dkt. No. 1: Pet. Ex C: Miscellaneous Certificate No. 13867; Pet. Ex. C: 5/14/97 Rap Sheet), or was made solely by Skinner and unsupported by any other evidence. As the State noted, "[i]ndictment #8190/96 was the indictment that superseded indictment #8151/96. While it is true that indictment #8151/96 was dismissed, it was dismissed only after it was superseded by indictment #8190/96." (Dkt. No. 1: Pet. Ex. F, ex. e: 4/11/97 A.D.A. Gagan Response to Skinner Motion to Set Aside Verdict at 11.) Moreover, as the State later noted, "[t]he trial court was at the trial and obviously knew, notwithstanding the DCJS error, that it had not

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46/ (...continued)
evidence.'"); Brown v. Costello, 00 Civ. 4734, 2003 WL 118499 at *8 (S.D.N.Y. Jan. 13, 2003) ("State court factual determinations must be presumed correct unless the petitioner is able to rebut them with clear and convincing evidence."); Grate v. Stinson, 224 F. Supp. 2d 496, 501 (E.D.N.Y. 2002) (Post-AEDPA, "a federal court conducting a collateral review must still presume state court findings of fact to be correct, 28 U.S.C. § 2254(e), although it is probably harder now [than pre-AEDPA] for a habeas petitioner to overcome this presumption, as the petitioner must now present clear and convincing evidence that the finding of fact was erroneous, id.").

dismissed the indictment and that defendant had been convicted under it." (Dkt. No. 17: Skinner Judicial Disqualification Motion Ex. B: 4/25/00 State Letter to N.Y. Ct. App. at 2.)

Whether indictment 8190/96 was dismissed before consolidation with 4378/96 is a matter of historical fact subject to the presumption of correctness under 28 U.S.C. § 2254(e)(1). Skinner has not presented clear and convincing evidence to rebut the C.P.L. § 440 court's and First Department's factual conclusion, which this Court must otherwise presume to be correct.[47/] 28 U.S.C. § 2254(e); see, e.g., Tibbs v. Greiner, 2003 WL 1878075 at *10; Avincola v. Stinson, 60 F. Supp. 2d 133, 164 (S.D.N.Y. 1999) (Scheindlin, D.J. & Peck, M.J.); Rivas v. Keane, 97 Civ. 2560, 1998 WL 804741 at *3 (S.D.N.Y. Nov. 17, 1998) (Parker, D.J.); Rodriguez v. Bennett, 1998 WL 765180 at *3. Furthermore, this Court cannot say that the state courts' factual determination that indictment number 8190/96 was not dismissed prior to consolidation was based on an unreasonable determination of the facts. 28 U.S.C.§ 2254(d)(2). Accordingly, Skinner's habeas claim that he was subjected to double jeopardy (Pet. ¶ 12(D)) should be denied.

V. SKINNER'S CONFRONTATION CLAUSE CLAIM SHOULD BE DENIED BECAUSE HE HAS FAILED TO REBUT THE STATE COURT'S FINDING THAT SKINNER'S MISCONDUCT CAUSED THE WITNESS'S UNAVAILABILITY

Skinner argues that his Confrontation Clause rights were violated when the state trial court allowed Rosado's grand jury testimony to be read into the record at trial, depriving Skinner of

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47/ Indeed, in Skinner's brief to the First Department appealing the denial of his § 440 motion, Skinner's counsel conceded that the Division of Criminal Justice Services ("DCJS") had amended Skinner's criminal history record to reflect that indictment 8190/96 had not been dismissed. (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 70.) Skinner tries to shift his burden to the State, arguing that "[i]f the record contradicts petitioner's allegations that indictment #8190/96 wasn't [sic] dismissed[] and sealed why didn't Respondent attach an official document to refute these allegations once and for all, instead of her self serving baseless remarks." (Dkt. No. 19: Traverse at 10.)

the opportunity to cross-examine Rosado. (Dkt. No. 19: Traverse at 50-51.)[48/] The trial court held a Sirois hearing[49/] (Tr. 344-73) outside the jury's presence at which Rosado testified that he would rather go to jail for contempt than testify at Skinner's trial because he believed that testifying would threaten his and his family's safety. (Rosado: Tr. 353.) An investigator from the District Attorney's Office testified that Rosado "was adamant that he would refuse" to testify in court because "he was in fear of his life, [and] that something would happen to him should he testify." (Connelly: Tr. 355.) Rosado told the officer that Skinner had threatened him in the past and that even though Skinner was in jail, Skinner's family and friends "would get to [Rosado] and [Rosado] would end up being killed." (Connelly: Tr. 356.)

[48/] Although Skinner did not raise this claim in his petition but only in his Traverse, the Court will liberally construe his pro se petition to include this claim. See, e.g., McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999); Aramas v. Donnelly, 99 Civ. 11306, 2002 WL 31307929 at *5 n.4 (S.D.N.Y. Oct. 15, 2002) (Peck, M.J.); Walker v. Pataro, 99 Civ. 4607, 2002 WL 664040 at *5 (S.D.N.Y. Apr. 23, 2002) (Peck, M.J.); Ventura v. Artuz, 99 Civ. 12025, 2000 WL 995497 at *7 (S.D.N.Y. July 19, 2000) (Peck, M.J.).

[49/] The hearing is named for the defendant in People v. Sirois, the criminal case considered in In re Holtzman v. Hellenbrand, 92 A.D.2d 405, 415, 460 N.Y.S.2d 591, 597 (2d Dep't 1983), which held that

> (1) whenever the People allege specific facts which demonstrate a "distinct possibility" (United States v. Mastrangelo, 662 F. 2d 946, 952 [(2d Cir.1982)]), that a criminal defendant's misconduct has induced a witness' unlawful refusal to testify at trial or has caused the witness' disappearance or demise, the People shall be given the opportunity to prove that misconduct at an evidentiary hearing;
> (2) at said hearing the burden shall be upon the People to prove defendant's misconduct by clear and convincing evidence; . . . and
> (3) upon an affirmative finding by the court on the issue of defendant's misconduct, the defendant will be deemed to have waived any objection to the admissibility of the witness' prior Grand Jury testimony and said testimony may be admitted as direct evidence at the defendant's trial.

See also People v. Geraci, 85 N.Y.2d 359, 363 n.1, 625 N.Y.S.2d 469, 471 n.1 (1995).

At the conclusion of the hearing, the trial court made the factual finding that Rosado's "refusal to testify is based upon actual threats of bodily harm to the witness, and at least in the perception of the witness, to members of his family, which threats were directly initiated and caused by this defendant." (Tr. 364.) The trial court found that Rosado "acknowledged that his refusal [to testify] could result in his incarceration" and indicated that he would nevertheless refuse to testify. (Tr. 364.) Rosado "indicated that he had testified in the Grand Jury only because he did not realize" that was the reason he was brought downtown and "implicitly, he was regretting having testified before the Grand Jury." (Tr. 364-65.) The trial court concluded as a matter of law that the State made the required showing of "clear and convincing evidence" under People v. Geraci, 85 N.Y.2d at 367, 625 N.Y.S.2d at 473-74, that Rosado's unavailability was procured by Skinner's threats to Rosado, and that "since the unavailability of this witness to testify at trial was procured by the misconduct of the defendant," the court would permit the State to read into evidence Rosado's grand jury testimony. (Tr. 365.)

On appeal to the First Department, Skinner argued that the trial court erred in admitting Rosado's grand jury testimony because: (1) the prosecution failed to prove by clear and convincing evidence that Skinner was responsible for Rosado's refusal to testify, and even if it did, (2) the court should have first taken reasonable steps to compel Rosado to testify before admitting his grand jury testimony. (Dkt. No. 1: Pet. Ex. A: Skinner 1st Dep't Br. at 52-57.)

The First Department held:

> The court properly exercised its discretion in admitting the Grand Jury testimony of an eyewitness, since the People proved by clear and convincing evidence, following a hearing, that the witness's unavailability at trial was caused by threats made by defendant. The court properly exercised its discretion in declining defendant's request that it attempt to

> compel the witness to testify, since the witness had already testified and he was aware of his legal obligation to testify but that his fear was so intense that he would rather go to jail.

People v. Skinner, 269 A.D.2d 202, 202-03, 704 N.Y.S.2d 18, 19-20 (1st Dep't 2000).

The Confrontation Clause of the Sixth Amendment affords the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment's Confrontation Clause is applicable in state criminal trials via the Fourteenth Amendment. E.g., Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076 (1965); Pointer v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 1068 (1965).[50/] The primary purpose of the Confrontation Clause is to prevent out-of-court statements from being used against a criminal defendant in lieu of in-court testimony subject to the scrutiny of cross-examination. E.g., Douglas v. Alabama, 380 U.S. at 418-19, 85 S. Ct. at 1076-77.[51/]

"Although the confrontation right is of constitutional dimension, it is not absolute . . . [and] it may be waived by the defendant's misconduct." United States v. Dhinsa, 243 F.3d 635, 651 (2d Cir.) (collecting cases recognizing circumstances in which a defendant waives his confrontation

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[50/] See also, e.g., Aramas v. Donnelly, 99 Civ. 11306, 2002 WL 31307929 at *11 (S.D.N.Y. Oct. 15, 2002) (Peck, M.J.); James v. People of the State of New York, 99 Civ. 8796, 2001 WL 706044 at *9 (S.D.N.Y. Jun. 8, 2001) (Peck, M.J.); Mendez v. Artuz, 98 Civ. 2652, 2000 WL 722613 at *29 (S.D.N.Y. June 6, 2000) (Peck, M.J.), report & rec. adopted, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) (McKenna, D.J.), aff'd, 303 F.3d 411 (2d Cir. 2002), cert. denied, 123 S. Ct. 1353 (2003); Avincola v. Stinson, 60 F. Supp. 2d 133, 153 (S.D.N.Y. 1999) (Scheindlin, D.J. & Peck, M.J.).

[51/] See also, e.g., Cotto v. Herbert, No. 01-2694, 2003 WL 1989700 at *5 (2d Cir. May 1, 2003); Ryan v. Miller, 303 F.3d 231, 247 (2d Cir. 2002); Mitchell v. Hoke, 930 F.2d 1, 2 (2d Cir. 1991); Aramas v. Donnelly, 2002 WL 31307929 at *11; James v. People, 2001 WL 706044 at *9; Mendez v. Artuz, 2000 WL 722613 at *29; Avincola v. Stinson, 60 F. Supp. 2d at 153.

right), cert. denied, 534 U.S. 897, 122 S. Ct. 219 (2001).[52/] The Second Circuit applies "the waiver-by-misconduct rule in cases where the defendant has wrongfully procured a witness's silence through threats, actual violence, or murder." Cotto v. Herbert, 2003 WL 1989700 at *8; accord, e.g., id. at *10 ("witness intimidation is the paradigmatic example of the type of 'misconduct' that can lead to the forfeiture of confrontation rights"); United States v. Dhinsa, 243 F.3d at 651-52; United States v. Miller, 116 F.3d at 668; United States v. Thai, 29 F.3d at814; Silverman v. Edwards, No. 99-CV-7792, 2002 WL 257820 at *10 (E.D.N.Y. Jan. 28, 2002); Geraci v. Senkowski, 23 F. Supp. 2d 246, 261 (E.D.N.Y. 1998) ("[I]t is well established that, where a defendant procures the silence of an adverse witness, 'whether by chicanery, actual violence or murder,' the Constitution does not prevent a trial court from holding that a defendant 'cannot then assert his confrontation clause rights in order to prevent prior grand jury testimony of that witness from being admitted against him.'") (quoting United States v. Mastrangelo, 693 F.2d, 269, 272 (2d Cir. 1982)), aff'd, 211 F.3d 6 (2d Cir.), cert. denied, 531 U.S. 1018, 121 S. Ct. 581 (2000).

Because the Second Circuit, under United States v. Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982), "requires that a court find by 'a preponderance of evidence' that a defendant was responsible for a witness's unavailability before Sixth Amendment rights can be waived," a New York court's finding of admissibility after a Sirois hearing applying the state's "higher standard of 'clear and convincing' evidence [set forth in People v. Geraci, 85 N.Y.2d 359, 362, 625 N.Y.S.2d

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[52/] Accord, e.g., United States v. Miller, 116 F.3d 641, 668 (2d Cir. 1997) ("The right to confront hostile witnesses may be constructively waived by a defendant's conduct."), cert. denied, 524 U.S. 905, 118 S. Ct. 2063 (1998); United States v. Thai, 29 F.3d 785, 814-15 (2d Cir.), cert. denied, 513 U.S. 977, 115 S. Ct. 456 (1994); LaTorres v. Walker, 216 F. Supp. 2d 157, 165-66 (S.D.N.Y. 2000).

469, 470 (1995)] . . . if correct, would also satisfy the constitutional standard." LaTorres v. Walker, 216 F. Supp. 2d at 166; see also Cotto v. Herbert, 2003 WL 1989700 at *11 (Second Circuit's own "requirement on the standard of proof applicable at a federal Mastrangelo hearing – that the government prove by a preponderance of the evidence that the defendant procured the witness's unavailability – is actually less stringent than the New York standard, which requires a showing of intimidation by clear and convincing evidence.").

Skinner's confrontation clause claim relies on his argument that, in retrospect, he posed no danger to Rosado: Rosado "testified before the grand jury on or about September 25, 1996, [and] petitioner was arrested and incarcerated from that time to present date [and] the People never alleged any further threats from petitioner. . ." (Dkt. No. 19: Traverse at 50-51.) Skinner essentially disputes the trial court's factual finding that Rosado's "refusal to testify is based upon actual threats of bodily harm to the witness, and at least in the perception of the witness, to members of his family, which threats were directly initiated and caused by this defendant." (Tr. 364.) That factual finding, which was affirmed by the First Department, People v. Skinner, 269 A.D.2d 202, 202-03, 704 N.Y.S.2d 18, 19-20 (1st Dep't 2000), is a factual determination entitled to a presumption of correctness under 28 U.S.C. 2254(e)(1). (See cases cited at pages 60-61 above.)

Skinner has presented no evidence, much less clear and convincing evidence, that the state courts erred in this finding. In the absence of such evidence, this Court is not permitted to re-evaluate the credibility of witnesses not before it (such as Rosado), and has no basis here to disturb the state court's credibility determinations. See, e.g., Cotto v. Herbert, 2003 WL 1989700 at *10 ("Under 28 U.S.C. § 2254(e)(1), the fact-findings of the trial court are subject to a 'presumption of correctness,' a presumption that is particularly important when reviewing the trial court's assessment

of witness credibility."); Tirado v. Walsh, 168 F. Supp. 2d 162, 170 (S.D.N.Y. 2001); LaTorres v. Walker, 216 F. Supp. 2d 157, 167 (S.D.N.Y. 2000) ("It is well settled that on habeas corpus review deference is to be given to factual findings made by state courts . . . . This is particularly the case when a witness's credibility is in question. '[AEDPA] gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.'").

Furthermore, this Court cannot say that the state court's factual determination that Skinner's threats caused Rosado's refusal to testify (Tr. 364) was based on an unreasonable determination of the facts. 28 U.S.C.§ 2254(d)(2); see, e.g., Cotto v. Herbert, 2003 WL 1989700 at *10 ("Given the extremely narrow scope of our review [under 2254(e)(1)], we cannot reverse the [state] trial court's finding that [petitioner] was behind the intimidation of [the unavailable witness] as an 'unreasonable determination of the facts in light of the evidence presented.' 28 U.S.C. 2254(d)(2)."); United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir.) (where hearing testimony provided "ample support" for the finding that defendant's threats caused witness's unavailability and "finding was based largely on [hearing judge's] evaluation of the credibility of this testimony," there was no basis for appellate court to hold that the hearing court's ruling was clearly erroneous. "Since the record fully supports the finding that [defendant] was responsible for the witnesses' unavailablility, his confrontation clause objections to the admission of grand jury testimony carry no weight."), cert. denied, 469 U.S. 918, 105 S. Ct. 297 (1984); Geraci v. Senkowski, 23 F. Supp. 2d at 259 ("The [state] trial court properly found that [the witness] changed his testimony [from the time of the Grand Jury to the Sirois hearing] as a result of threats that originated with or were

condoned by the petitioner. The petitioner has not overcome the presumption of correctness enjoyed by that finding. Nor has he shown that the state adjudication of the claim 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.' 28 U.S.C. § 2254 (d)(2).").

Accordingly, Skinner's Confrontation Clause habeas claim should be denied.

VI. SKINNER'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS SHOULD BE DENIED

Skinner's habeas petition alleges that his trial counsel, Lynne Stewart, provided ineffective assistance in three respects: (1) Stewart failed to appear at Skinner's arraignment for witness tampering and intimidation, indictment number 8190/96, which he asserts was "the day of the dismissal" of that indictment; (2) Stewart failed to file an omnibus motion for indictment number 8190/96; and (3) Stewart failed to call as trial witnesses "alibi witness Anna Rivera at trial and the arresting detective" and "refused to question the arresting officer" on indictment number 8190/96. (Dkt. No. 1: Pet. ¶ 12(E).) These issues will be discussed in Points VI.A & B below. Skinner also alleges that counsel Stewart had a conflict of interest because "Stewart was under indictment by the same office" as Skinner. (Id.) The conflict claim is discussed in Point VII below.

A. The Strickland v. Washington Standard On Ineffective Assistance of Counsel[53/]

In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court announced a two-part test to determine if counsel's assistance was ineffective: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064. This performance is to be judged by an objective standard of reasonableness. Id. at 688, 104 S. Ct. at 2064; accord, e.g., Bell v. Cone, 535 U.S. 685, 695, 122 S. Ct. 1843, 1850 (2002).

53/ For additional decisions authored by this Judge discussing the Strickland v. Washington standard for ineffective assistance of counsel in language substantially similar to this section of this Report & Recommendation, see Quinones v. Miller, 01 Civ. 10752, 2003 WL 21276429 at *18-19 (S.D.N.Y. June 3, 2003) (Peck, M.J.); Hediam v. Miller, 02 Civ. 1419, 2002 WL 31867722 at *14-16 (S.D.N.Y. Dec. 23, 2002) (Peck, M.J.); Rosario v. Bennett, 01 Civ.7142, 2002 WL 31852827 at *26-28 (S.D.N.Y. Dec. 20, 2002) (Peck, M.J.) Dickens v. Filion, 02 Civ. 3450, 2002 WL 31477701 at *13-14 (S.D.N.Y. Nov. 6, 2002) (Peck, M.J.); Aramas v. Donnelly, 99 Civ. 11306, 2002 WL 31307929 at *9-11 (S.D.N.Y. Oct. 15, 2002) (Peck, M.J.); Larrea v. Bennett, 01 Civ. 5813, 2002 WL 1173564 at *16-19 (S.D.N.Y. May 31, 2002) (Peck, M.J.), report & rec. adopted, 2002 WL 1808211 (S.D.N.Y. Aug. 6, 2002) (Scheindlin, D.J.); Jamison v. Berbary, 01 Civ. 5547, 2002 WL 1000283 at *9-11 (S.D.N.Y. May 15, 2002) (Peck, M.J.); Cromwell v. Keane , 98 Civ. 0013, 2002 WL 929536 at *15-17 (S.D.N.Y. May 8, 2002) (Peck, M.J.); Rivera v. Duncan, 00 Civ. 4923, 2001 WL 1580240 at *9 (S.D.N.Y. Dec. 11, 2001) (Peck, M.J.); Ennis v. Walker, 00 Civ. 2875, 2001 WL 409530 at *15-16 (S.D.N.Y. Apr. 6, 2001) (Peck, M.J.); Fluellen v. Walker, 97 Civ. 3189, 2000 WL 684275 at *11 (S.D.N.Y. May 25, 2000) (Peck, M.J.), aff'd, No. 01-2474, 41 Fed. Appx. 497, 2002 WL 1448474 (2d Cir. June 28, 2002); Dukes v. McGinnis, 99 Civ. 9731, 2000 WL 382059 at *8 (S.D.N.Y. Apr. 17, 2000) (Peck, M.J.); Cruz v. Greiner, 98 Civ. 7939, 1999 WL 1043961 at *16 (S.D.N.Y. Nov. 17, 1999) (Peck, M.J.); Lugo v. Kuhlmann, 68 F. Supp. 2d 347, 370 (S.D.N.Y. 1999) (Patterson, D.J. & Peck, M.J.); Santos v. Greiner, 99 Civ. 1545, 1999 WL 756473 at *7 (S.D.N.Y. Sept. 24, 1999) (Peck, M.J.); Franza v. Stinson, 58 F. Supp. 2d 124, 133-34) (S.D.N.Y. 1999) (Kaplan, D.J. & Peck, M.J.); Torres v. Irvin, 33 F. Supp. 2d 257, 277 (S.D.N.Y. 1998) (Cote, D.J. & Peck, M.J.); Boyd v. Hawk, 965 F. Supp. 443, 449 (S.D.N.Y. 1997) (Batts, D.J. & Peck, M.J.).

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time . . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065 (citation omitted).[54/]

Second, the defendant must show prejudice from counsel's performance. Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2064. The "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Id. at 695, 104 S. Ct. at 2068-69. Put another way, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068.[55/]

[54/] Accord, e.g., Bell v. Cone, 535 U.S. at 698, 122 S. Ct. at 1852; Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001); Sellan v. Kuhlman, 261 F.3d 303, 315 (2d Cir. 2001).

[55/] See also, e.g., Bell v. Cone, 535 U.S. at 695, 122 S. Ct. at 1850; Aparicio v. Artuz, 269 F.3d at 95; Sellan v. Kuhlman, 261 F.3d at 315; DeLuca v. Lord, 77 F.3d 578, 584 (2d Cir.), cert. denied, 519 U.S. 824, 117 S. Ct. 83 (1996).

> "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068. The phrase "reasonable probability," despite its language, should not be confused with "probable" or "more likely than not." Strickler v. Greene, 527 U.S. 263, 289-91, 119 S. Ct. 1936, 1952-53 (1999); Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1565-66 (1995); Nix v. Whiteside, 475 U.S. 157, 175, 106 S. Ct. 988, 998 (1986) ("a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland"); Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the
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> (continued...)

The Supreme Court has counseled that these principles "do not establish mechanical rules." Strickland v. Washington, 466 U.S. at 696, 104 S. Ct. at 2069. The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. Id.

Any counsel errors must be considered in the "aggregate" rather than in isolation, as the Supreme Court has directed courts "to look at the 'totality of the evidence before the judge or jury.'" Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001) (quoting Strickland v. Washington, 466 U.S. at 695-96, 104 S. Ct. at 2069); accord, e.g., Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991).

The Supreme Court also made clear that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697, 104 S. Ct. at 2069.[56/]

In addition, the Supreme Court has counseled that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

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[55/] (...continued)
evidence to have determined the outcome."). Rather, the phrase "reasonable probability" seems to describe a fairly low standard of probability, albeit somewhat more likely than a "reasonable possibility." Strickler v. Greene, 527 U.S. at 291, 119 S. Ct. at 1953; cf. id. at 297-301, 119 S. Ct. at 1955-58 (Souter, J., concurring & dissenting) (arguing that any difference between "reasonable probability" and "reasonable possibility" is "slight").

[56/] Accord, e.g., Smith v. Robbins, 528 U.S. 259, 286 n.14, 120 S. Ct. 746, 764 n.14 (2000).

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland v. Washington, 466 U.S. at 690-91, 104 S. Ct. at 2066.[57/]

As the Second Circuit noted: "The Strickland standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." Lindstadt v. Keane, 239 F.3d at 199.

For purposes of this Court's AEDPA analysis, "the Strickland standard . . . is the relevant 'clearly established Federal law, as determined by the Supreme Court of the United States.'" Aparicio v. Artuz, 269 F.3d at 95 & n.8 (quoting 28 U.S.C. § 2254(d)(1)).[58/] "For AEDPA purposes, a petitioner is not required to further demonstrate that his particular theory of ineffective assistance of counsel is also 'clearly established.'" Aparicio v. Artuz, 269 F.3d at 95 n.8. "For [petitioner] to succeed, however, he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied

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[57/] See also, e.g., Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575 (1982) ("We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim."); Jackson v. Leonardo, 162 F.3d 81, 85 (2d Cir. 1998) ("In reviewing Strickland claims, courts are instructed to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and that counsel's conduct was not the result of error but derived instead from trial strategy. We are also instructed, when reviewing decisions by counsel, not to 'second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every "colorable" claim' on appeal.") (citations omitted); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir.) (a reviewing court "may not use hindsight to second-guess [counsel's] strategy choices"), cert. denied, 513 U.S. 820, 115 S. Ct. 81 (1994).

[58/] See also, e.g., Bell v. Cone, 535 U.S. at 698, 122 S. Ct. at 1852; Sellan v. Kuhlman, 261 F.3d at 315.

Strickland incorrectly. . . . Rather, he must show that the [First Department] applied Strickland to the facts of his case in an objectively unreasonable manner." Bell v. Cone, 535 U.S. at 699, 122 S. Ct. at 1852.

B. Application of the Strickland Standard to Skinner's Ineffective Assistance Claim

1. Stewart's Failure to Appear at Skinner's Arraignment for Indictment Number 8190/96

Skinner argues that a transcript from Skinner's October 11, 1996 arraignment confirms that neither Stewart nor any other defense attorney was present. (Dkt. No. 19: Traverse Ex. F: 10/11/96 Arraignment Minutes.)[59/] That is correct, but Skinner does not claim, and the Court

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[59/]

Court Clerk:	Calender #10, Rodney Skinner. Calendar #11, supercedes calendar #10.
The Court:	Calendar #10 is dismissed as being superceded by #11.
Court Clerk:	Rodney Skinner, you are charged with intimidating a witness in the third degree. How do you plead; guilty or not guilty?
[Skinner]:	Not guilty.
The Court:	Wheel the case. Notify his counsel. Mr. Pet[t]us is his attorney.
Court Clerk:	No, I have a notice of appearance from Lynn[e] Stewart.
The Court:	Wheel the case.
[ADA] Hoexter:	The case should go to Part 41, for October 17.
The Court:	October 17, Part 41. Notify Ms. St[ew]art that's for motions.
[ADA] Hoexter:	Remand continued?
The Court:	Yes.

(Dkt. No. 19: Traverse Ex. F: 10/11/96 Arraignment Minutes.)

cannot find, that Stewart's failure to appear prejudiced Skinner in any way. Specifically, Skinner appears to be claiming that Stewart's failure to appear at the 8190/96 arraignment lends support to his allegation that that indictment was dismissed before consolidation with indictment 4378/96. (See pages 54-55 above.) In his Traverse, Skinner claims that on September 30, 1996, after his original counsel, Marvin Pettus, "advised the court that petitioner could not have threaten[ed] the three . . . alleged witnesses under indictment # 8190/96 because at the time of these alleged threats these complainants were incarcerated and petitioner[] was out on bail under indictment # 4378/96," Assistant District Attorney Gagan "panic[ked]" and dismissed the indictment. (Dkt. No. 19: Traverse at 39-40; see Dkt. No. 19: Traverse Ex. D: 9/30/96 Transcript.) Furthermore, Skinner claims that the dismissal "should explain why Ms. Stewart[] did not appear on October 11, 1996." (Traverse at 40.) It is unclear, then, why Skinner refers to October 11, 1996 in his petition as "the day of the dismissal." (Dkt. No. 1: Pet. ¶ 12(E).)[60/]

[60/] The State argues that Stewart alerted Skinner on October 8, 1996 that she was unavailable on October 11, 1996 and Skinner retained her despite this fact. (Dkt. No. 15: State Br. at 38-39.) In this letter, Stewart wrote:

> If it is possible, we would like to be retained before October 11, when you appear in part 50. This is because we wish to immediately file a motion for your testimony to be heard by the grand jury.
>
> I was sorry not to be able to meet with your mother but her travel schedule and mine conflicted. I will be back in the office on Tuesday, October 15th, but if arrangements can be made please have your mother call and speak to Geoffrey Stewart [a lawyer associated with Lynne Stewart's office].

(Dkt. No. 19: Traverse Ex. E: 10/8/96 Stewart Letter to Skinner.) The Court agrees with Skinner that the letter does not clearly convey the fact that Stewart would not appear on October 11. (Traverse at 3.) Indeed, the Court questions why Stewart would ask to be retained in order to file a prompt motion, file a notice of appearance, and yet not appear at the arraignment or ensure that another lawyer was present.

While Skinner may be arguing that Stewart's failure to be present on October 11, 1996 during the "dismissal," which in fact was merely a superceding indictment (see page 62 above), led Skinner to be subjected to double jeopardy, the Court has already addressed and rejected Skinner's double jeopardy claim on the merits. Thus, Skinner has failed to show prejudice and this aspect of his ineffective assistance claim should be denied.[61/]

2. Stewart's Failure to File an Omnibus Motion for Indictment Number 8190/96

The trial court denied Skinner's claim that Stewart was ineffective for failing to file an omnibus motion in connection with indictment 8190/96, stating:

> I conclude that the sole new issue raised is the claim that defendant's trial counsel, Lynne Stewart, was ineffective because she allegedly failed to file the proper pre-trial motions. While such a claim could have been raised on his direct appeal, see CPL § 440.10(2)(c), this Court will nonetheless address it. In support of this claim, the defendant attaches a transcript of colloquy between Judge Herbert Altman and Ms. Stewart, in which Judge Altman comments upon Ms. Stewart's lack of punctuality in filing her motions. While this may be interesting for its "Day in the Life of the Court" quality, the inference which the

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61/ Moreover, because the October 11, 1996 arraignment was a pre-trial proceeding, Skinner's deprivation of counsel is subject to harmless error analysis. "Unlike violations of the right to counsel at trial, pre-trial violations of the right to counsel are subject to harmless error analysis." Gayle v. Lacy, No. 95CV683, 1997 WL 610654 at *9 (N.D.N.Y. Oct. 1, 1997) (Pooler, D.J.) ("[P]etitioner offers no proof of harm result from the absence of counsel at the initial arraignment" and Court found petitioner was not harmed.) (citing for harmless error rule United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938, 942 (1986), & Coleman v. Alabama, 399 U.S. 1, 11, 90 S. Ct. 1999, 2004 (1970)); see also, e.g., Jones v. Spitzer, 01 Civ. 9754, 2003 WL 1563780 at *13 (S.D.N.Y. Mar. 26, 2003) ("Circuit courts have . . . routinely applied a harmless error analysis on habeas review of a claim regarding the denial of counsel during preliminary hearings of state criminal proceedings."); Brown v. Hoke, No. 87 CV 2066, 1987 WL 25887 at *4 (E.D.N.Y. Nov. 18, 1987) (same; although petitioner did not validly waive right to counsel before the grand jury, the error was harmless because the "grand jury merely charged petitioner" and "[t]he petit jury found petitioner guilty without hearing his grand jury testimony."). In the absence of any evidence that Skinner was prejudiced by Stewart's failure to appear at the arraignment, any violation of Skinner's right to counsel at the arraignment was harmless.

> defendant would like to draw from this transcript is vitiated by what actually happened in the case. . .
>
> The issue of pre-trial hearings [was] irrelevant to indictment number 8190/96 because the People did not serve notice as to any statements, identifications, or recovered property. Only felony grand jury notice was served as to 8190/96 pursuant to CPL § 190.50(5)(a). Parenthetically, it should be noted that the defendant, through his attorney, did challenge that indictment, claiming a violation of his right, upon written notice, to testify before the Grand Jury. Judge Altman found that claim meritless on November 14, 1996. [footnote omitted]
>
> In view of the documented fact that appropriate pre-trial motions were filed on the defendant's behalf, his latest claim of ineffective assistance of counsel is groundless, and affords no basis for relief. In addition, the defendant has not met his burden of showing what motions that should have been made were not made, and that had they been made, would have made a difference.

(Dkt. No. 8: 5/16/02 Justice Wetzel Order at 3-4, emphasis added.)

The § 440 court's finding, as a "documented fact," that "appropriate pre-trial motions were filed on the defendant's behalf" (in connection with the consolidated indictments, even if not specific to indictment 8190/96) is a factual determination entitled to a presumption of correctness under 28 U.S.C. 2254(e)(1), and Skinner has failed to present contrary evidence. (See cases cited pages 60-61 above.) Moreover, as the § 440 court noted, Skinner does not allege, much less show, what specific motions should have been made or, if made, how it would have benefitted Skinner. Thus, even assuming that proper motions were not filed, Skinner has not shown prejudice. Accordingly, this part of his ineffective assistance claim should be denied.

3. Stewart's Failure to Call Certain Witnesses

Skinner's petition asserts that "[c]ounsel refused to question the arresting officer about this arrest at trial . . . [and] refused to call alibi witness Anna Rivera at trial and the arresting detective." (Dkt. No. 1: Pet. ¶ 12(E).) Skinner's Traverse further alleges that Stewart "did not just

fail[] to call one witness[] but six witnesses": (1) Anna Rivera, (2) Dolph LeMoult, "author of petitioner's autobiography," (3) Alice Martell, "petitioner's book agent," (4) Betty White, a special education supervisor at a junior high school, (5) Jesse Cruz, "the un-refuted source of the 911 tape descriptions," and (6) Detective Joseph Pagan, "the detective who advised the other police officers to arrest petitioner." (Dkt. No. 19: Traverse at 27-28.)

Courts in this Circuit have made clear that "[t]he decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir.), cert. denied, 484 U.S. 958, 108 S. Ct. 357 (1987); see also, e.g., United States v. DeJesus, No. 01-1479, 57 Fed. Appx. 474, 478, 2003 WL 193736 at *3 (2d Cir. Jan. 28, 2003) ("A trial counsel's 'decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial.' United States v. Smith, 198 F.3d 377, 386 (2d Cir. 1999). Because of this inherently tactical nature, the decision not to call a particular witness generally should not be disturbed.") (counsel's decision not to call a character witness was grounded in strategy and not deficient, "even though [defendant] requested that she do so and provided her with contact information for potential witnesses."); United States v. Eyman, 313 F.3d 741, 743 (2d Cir. 2002) ("A failure to call a witness for tactical reasons of trial strategy does not satisfy the standard for ineffective assistance of counsel."); United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998), 526 U.S. 1164, 119 S. Ct. 2059 (1999); United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.), cert. denied, 522 U.S. 846, 118 S. Ct. 130 (1997); Nieves v. Kelly, 96 Civ. 4382, 990 F. Supp. 255, 263-64 (S.D.N.Y. 1997) (Cote,

D.J. & Peck, M.J.); Rodriguez v. Mitchell, 92 Civ. 2083, 1993 WL 229013 at *3, 5 (S.D.N.Y. June 24, 1993) ("Counsel's decision not to call a witness, if supported by valid tactical considerations, does not constitute ineffective assistance of counsel.").

More importantly, "[g]enerally, the decision whether to pursue a particular defense is a tactical choice which does not rise to the level of a constitutional violation. . . . [T]he habeas court 'will not second-guess trial strategy simply because the chosen strategy has failed . . . ,' especially where the petitioner has failed to identify any specific evidence or testimony that would have helped his case if presented at trial." Jones v. Hollins, 884 F. Supp. 758, 765-66 (W.D.N.Y. 1995) (citations omitted), aff'd, 89 F.3d 826, 1995 WL 722215 (2d Cir. 1995); see, e.g., United States v. Vegas, 27 F.3d 773, 777-78 (2d Cir.) ("As is often the case when convicted defendants complain after-the-fact of their lawyers' trial performance, we find that the choices made by the attorney were matters of trial strategy; because counsel's strategy was a reasonable one, these claims do not show incompetence"; not ineffective to pursue entrapment defense rather than innocence defense), cert. denied, 115 S. Ct. 284 (1994); Lawson v. Caspari, 963 F.2d 1094, 1096 (8th Cir. 1992) (counsel not ineffective for failing to call alibi witnesses he did not believe were credible, especially where counsel "presented a theory of the case by pointing out the 'weaknesses in the state's case and rais[ing] serious questions about the credibility of the state's sole eyewitness.'"); Harris v. Hollins, 95 Civ. 4376, 1997 WL 633440 at *6 (S.D.N.Y. Oct. 14, 1997) (counsel not ineffective for not securing alibi witnesses where counsel presented a vigorous defense).[62/]

[62/] See also, e.g., LaFrance v. Mitchell, 93 Civ. 0804, 1996 WL 741601 at *2 (S.D.N.Y. Dec. 27, 1996) ("It is quite evident that the decision to omit this [alibi] defense was a sound one and that the basis for an effective alibi defense simply did not exist."); Johnson v. Mann, (continued...)

Moreover, a petitioner may not merely allege that certain witnesses might have supplied relevant testimony, but must state exactly what testimony they would have supplied and how such testimony would have changed the result. See, e.g., Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) ("To affirmatively prove prejudice [from counsel's failure to investigate], a petitioner ordinarily must show not only that the testimony of uncalled witnesses would have been favorable, but also that those witnesses would have testified at trial."); Rosario v. Bennett, 01 Civ. 7142, 2002 WL 31852827 at *33 & n.59 (S.D.N.Y. Dec. 20, 2002) (Peck, M.J.); Cromwell v. Keane, 98 Civ. 0013, 2002 WL 929536 at *24 (S.D.N.Y. May 8, 2002) (Peck, M.J.); Greenidge v. United States, No. 01 CV 4143, 2002 WL 720677 at *2 (E.D.N.Y. Mar. 27, 2002) (§ 2255 case; petitioner's ineffective assistance of counsel claim has no merit where petitioner "nowhere specifies how the testimony of those witnesses [counsel purportedly failed to call] would have been helpful to his defense.").[63/]

[62/] (...continued)
92 Civ. 1909, 1993 WL 127954 at *1 (S.D.N.Y. April 20, 1993) (counsel not ineffective for strategic decision to attack identification of petitioner rather than to rely on an "inherently suspect" alibi defense); Munoz v. Keane, 777 F. Supp. 282, 288-89 (S.D.N.Y. 1991) ("Given the overwhelming evidence that [petitioner] participated in the drug transaction at issue, it was reasonable for defense counsel to conclude, as a strategic matter, that presenting testimony of the alleged alibi witnesses would be damaging to [petitioner's] case."), aff'd sub nom. Linares v. Senkowski, 964 F.2d 1295 (2d Cir.), cert. denied, 506 U.S. 986, 113 S. Ct. 494 (1992); Minor v. Henderson, 754 F. Supp. 1010, 1017-18 (S.D.N.Y. 1991) (counsel not ineffective for tactical choice not to present alibi defense where evidence petitioner believed supported such defense did not exist); Buitrago v. Scully, 705 F. Supp. 952, 954 (S.D.N.Y. 1989) (counsel not ineffective for failing to present alibi witness where petitioner fails to show witness would provide alibi).

[63/] See also, e.g., Lou v. Mantello, No. 98-CV-5542, 2001 WL 1152817 at *10 (E.D.N.Y. Sept. 25, 2001) ("Habeas claims based on 'complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because (continued...)

Skinner's ineffective assistance claim for failure to call LeMoult[64/] and Martell should be denied because Skinner fails to indicate what they would have testified to and if they were willing to testify. Moreover, to the extent LeMoult and Martell would have testified to Skinner's reputation, their testimony would have been cumulative of the other defense reputation witnesses (see page 10 above). The failure to call cumulative or repetitive witnesses is neither ineffective nor prejudicial. See, e.g., United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998) ("The decision not to call a particular witness is typically a question of trial strategy that appellate courts are ill-suited to second guess." Where the witness defendant asserts counsel should have called "would have testified in a manner corroborative of another witness[,] counsel might well have regarded the testimony as unnecessarily cumulative."), cert. denied, 526 U.S. 1164, 119 S. Ct. 2059 (1999); Cotto v. Lord, 99

63/ (...continued)
allegations of what a witness would have testified [to] are largely speculative.'") (citations omitted); Muhammad v. Bennett, 96 Civ. 8430, 1998 WL 214884 at *1 (S.D.N.Y. Apr. 29, 1998) ("petitioner's speculative claim about the testimony of an uncalled witness" is insufficient to show ineffective assistance of trial counsel); Burke v. United States, 91 Civ. 468, 1992 WL 183752 at *2 (S.D.N.Y. July 22, 1992) (petitioner's "contention that he was denied effective assistance of counsel" where "his attorney failed to subpoena several witnesses who would have aided his defense is wholly insufficient given [petitioner]'s failure to set forth who the specific witnesses are or their relevant testimony."); Croney v. Scully, CV-86-4335, 1988 WL 69766 at *2 (E.D.N.Y. June 13, 1988) ("Petitioner's contention that assignment of an investigator would have been helpful to his defense is conclusory and speculative. Petitioner must show not only that the testimony would have been favorable, but also that the witness would have testified at trial."), aff'd, 880 F.2d 1318 (2d Cir. 1989).

64/ In Skinner's July 1997 C.P.L. § 440 motion, he stated that "[d]efense character witness Dolph L[e]Moult was never called in by Ms. Stewart because Ms. Stewart claimed the court would not allow his testimony unless it dealt with defendant's character on the Lower East Side. In fact, Mr. LeMoult could testify more in depth than any of the other character witnesses because of his months of collaboration with this defendant on a book proposal based on [Skinner's] life experiences entitled, 'Broken Eyes Don't Cry.'" (Dkt. No. 1: Pet. Ex. C: Skinner 7/12/97 C.P.L. § 440 Motion at 43.)

Civ. 4874, 2001 WL 21246 at *16 n.6 (S.D.N.Y. Jan. 9, 2001) (rejecting claim that counsel was ineffective for failing to call additional family members where petitioner "made no showing as to which other family members should have been called, what their testimony would have been and why that testimony would not have been cumulative of what the petitioner and [other witness] could provide."), aff'd, No. 01-2056, 21 Fed. Appx. 89, 2001 WL 1412350 (2d Cir. Nov. 8, 2001); White v. Keane, 51 F. Supp. 2d 495, 505 (S.D.N.Y. 1999) (Court rejected petitioner's claim that counsel was ineffective for failing to call witnesses where their testimony was "speculative, repetitive, vague, or related solely to the issue of credibility of one of the People's many witnesses.") (record citations omitted); Treppedi v. Scully, 85 Civ. 7308, 1986 WL 11449 at *3 (S.D.N.Y. Oct. 9, 1986) ("Since the effect of the presentation of additional alibi witnesses would have been cumulative at best, the failure of counsel to call additional alibi witnesses cannot be considered an error that deprived the defendant of a fair trial."), aff'd, 847 F.2d 837 (2d Cir. 1988); see also, e.g., United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990) ("The Constitution does not oblige counsel to present each and every witness that is suggested to him. In fact, such tactics would be considered dilatory unless the attorney and the court believe the witness will add competent, admissible and non-cumulative testimony to the trial record.").

Second, while Skinner claims that Cruz "would have testified that petitioner was not there when his friend Jehu Morales[] was shot, and he would have been able to testify that Benny Rosado, Anthony Baez, and Pedro Montalvo, were actually participants to the shooting of his friend Jehu" (Traverse at 27), Skinner fails to offer any support for his speculation that Cruz would have testified as such.

Third, Skinner describes Detective Pagan as "the detective who instructed Lt. Hernandez and Police Officer Adams to arrest [Skinner]" for the charges in indictment number 4378/96. (Pet. Ex. C: Skinner 7/12/97 C.P.L.§ 440 Motion at 6.) Again, because Skinner fails to provide any comprehensible explanation about what testimony Detective Pagan would have provided (e.g., Traverse at 28), his claim should be denied.

Fourth, Skinner's claim regarding White should be denied, as a stipulation regarding her testimony was admitted. Because "Ms. White's health was such that it was impossible or [im]practical to conduct the examination and take her testimony this morning," the parties stipulated that had Betty White been called, she would have testified that "[s]he was aware of Rodney Skinner's reputation for nonviolence and peacefulness" within his school community on the lower east side of Manhattan. (Tr. 1611-14.) Moreover, even if her videotaped testimony would have been more convincing than a stipulation, her reputation evidence was cumulative of other witnesses. (See cases cited at pages 82-83 above.)

Fifth, as to Anna Rivera, Stewart provided an explanation on the record for not calling Anna Rivera, when the prosecution requested a missing witness charge:

> I will very frankly say I did not call her. I spoke to her, but she was extremely reluctant. She did not want people to know that she was involved in this at all or involved with Rodney [Skinner], and when I asked a question on redirect [of Skinner] yesterday about whether she had a fiancee and whether she had a fiancee at this very time she was going to New Jersey with him . . . it would place before the jury some ostensible reason why this person would not be here.

(Tr. 1608.)[65/] Another factor weighing against calling Anna Rivera could have been the serious damage to Skinner's credibility on cross-examination about his direct testimony that he called Anna Rivera from his mother's house. (Skinner: Tr. 1376-79.) When confronted with phone records that indicated no call was made to Rivera from Skinner's mother's phone at that time, Skinner stated that he used his cellular phone. (Skinner: Tr. 1375-76.) When confronted with records that showed his cellular phone service had been terminated before that night, Skinner claimed he used a "cloned" phone. (Skinner: Tr. 1377-79, 1394-96.) In a letter to Skinner, Stewart's associate told Skinner that "Lynne [Stewart] has said she thought [A.D.A.] Gagan did an effective job cross-examining you." (Dkt. No. 17: Judicial Disqualification Motion Ex. D: 3/20/97 Geoffrey Stewart Letter to Skinner.)

Given Stewart's explanation on the record about why she did not call Anna Rivera as a witness, and the additional strategy that reasonably could have further motivated Stewart's decision not to call her, this Court cannot find Stewart's performance to be deficient. See, e.g., Ryan v. Rivera, No. 00-2153, 21 Fed. Appx. 33, 34, 2001 WL 1203391 at *1 (2d Cir. Oct. 9, 2001) ("[W]hen a party challenges matters of trial strategy, such as the decision not to call a witness, even greater deference is generally warranted: "'[A]n appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken.'") (quoting United States v. Luciano, 158 F.3d at 660); James v. United States, 00 Civ. 8818, 97 CR 185, 2002 WL 1023146 at *16 (S.D.N.Y. May 20, 2002) (Counsel's decision not to call witness was

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[65/] Stewart also could have reasonably decided to not call Rivera given her romantic relationship with Skinner. See, e.g., Aponte v. Scully, 740 F. Supp. 153, 158 (E.D.N.Y. 1990) (McLaughlin, D.J.) (counsel not ineffective for failing to call alibi witness who "had a romantic involvement with petitioner, which undercuts her credibility").

"supported by the fact that [witness] was [petitioner's] brother and would be subject to impeachment due to bias," was a matter of strategy and not ineffective assistance.).

As this Court has previously held, "'[t]he decision of whether to call or bypass a particular witness is a question of trial strategy which courts will practically never second-guess. . . . In the instant case, the testimony of any of these witnesses may have as likely exposed inconsistencies and weaknesses in defendant's case as have lent support to Petitioner's defense. Additionally, a defendant's conclusory allegations about the testimony of uncalled witnesses are insufficient to demonstrate prejudice.'" Cromwell v. Keane, 2002 WL 929536 at *24 (quoting Ozuru v. United States, No. 95 CV 2241, 1997 WL 124212 at *4 (E.D.N.Y. Mar. 11, 1997), aff'd, 152 F.3d 920 (2d Cir. 1998), cert. denied, 525 U.S. 1083, 119 S. Ct. 828 (1999)).

Skinner's habeas claim that Stewart was ineffective for not calling certain witnesses should be denied.

VII. SKINNER'S CLAIM THAT DEFENSE ATTORNEY STEWART HAD A CONFLICT OF INTEREST LACKS MERIT

Skinner's petition asserts that he received ineffective assistance of counsel because attorney "Stewart was under indictment by the same office" as Skinner. (Dkt. No. 1: Pet. ¶ 12(E).) According to Skinner, Stewart only "advised petitioner that she was about to be indicted after petitioner's conviction[. S]he thereafter asked the Court to be relieved[. H]er motion was granted. However, petitioner had retained new counsel after [Stewart] informed him of this crypt [sic] action against her. Ms. Stewart, without petitioner's knowledge had developed an open door relationship with the Homicide Investigations Unit, and its investigators, and prosecutors due to the fact [that] one of her clients was under cooperation . . . ." (Dkt. No. 19: Traverse at 32.)

A. Applicable Conflict of Interest Legal Principles[66/]

"'A defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel.'" United States v. Schwarz, 283 F.3d 76, 90 (2d Cir. 2002) (quoting United States v. Blau, 159 F.3d 68, 74 (2d Cir. 1998)).[67/] "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181 (1978); see also, e.g., Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1241 (2002). As the Supreme Court has repeatedly noted:

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . . [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another."

Wheat v. United States, 486 U.S. 153, 160, 108 S. Ct. 1692, 1697 (1988) (quoting Holloway v. Arkansas, 435 U.S. at 489-90, 98 S. Ct. at 1181). The right to conflict-free counsel applies equally to appointed and, as here, retained counsel. E.g., Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S. Ct. 1708, 1716 (1980).

66/ For an additional decision authored by this Judge discussing the applicable legal principles for analyzing attorney conflict of interest ineffectiveness habeas claims in language substantially similar to this section of this Report & Recommendation, see Quinones v. Miller, 01 Civ. 10752, 2003 WL 21276429 at *26-28 (S.D.N.Y. June 3, 2003) (Peck, M.J.).

67/ Accord, e.g., Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); United States v. Perez, 325 F.3d 115, 125 (2d Cir. 2003); United States v. Blount, 291 F.3d 201, 210 (2d Cir. 2002), cert. denied, 123 S. Ct. 938 (2003).

"'[A] defendant has suffered ineffective assistance of counsel in violation of the Sixth Amendment if his attorney has (1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney's performance.'" United States v. Blau, 159 F.3d at 74.[68/]

The standard governing an ineffective assistance of counsel claim based on an asserted conflict of interest was articulated by the Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980), and differs from the more general ineffective assistance standard enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). See, e.g., United States v. White, 174 F.3d 290, 294-95 (2d Cir. 1999). Indeed, both prongs of the standard – defective performance and prejudice – are substantially different under Cuyler v. Sullivan.

As to the defective performance prong, where, as here, a petitioner "raised no objection at trial" regarding the alleged conflict, Cuyler v. Sullivan, 446 U.S. at 348-49, 100 S. Ct. at 1718, his Sixth Amendment claim cannot prevail unless he demonstrates "that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance," Burger v. Kemp, 483 U.S. 776, 783, 107 S. Ct. 3114, 3120 (1987) (citations & internal quotations omitted); accord, e.g., Mickens v. Taylor, 122 S. Ct. at 1242 ("absent objection, a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation'") (quoting Cuyler v. Sullivan, 446 U.S. at 348-49, 100 S. Ct. at 1718). The Supreme Court recently clarified that "the Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth

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[68/] Accord, e.g., United States v. Perez, 325 F.3d at 125; United States v. Blount, 291 F.3d at 210-11; Lopez v. Scully, 58 F.3d 38, 41 (2d Cir. 1995).

Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Mickens v. Taylor, 122 S. Ct. at 1244 n.5; accord id. at 1243 ("we think 'an actual conflict of interest' mean[s] precisely a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties.").

"The burden of proof rest[s] on [petitioner] to show a conflict of interest by a preponderance of the evidence." Triana v. United States, 205 F.3d 36, 40 (2d Cir.) (§ 2255 proceeding), cert. denied, 531 U.S. 956, 121 S. Ct. 378 (2000); accord, e.g., Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001) (en banc) (petitioner must prove by preponderance of the evidence that actual conflict adversely affected attorney's performance), aff'd, 535 U.S. 162, 122 S. Ct. 1237 (2002); see also, e.g., Cuyler v. Sullivan, 446 U.S. at 348, 100 S. Ct. at 1718 ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."). "[T]he burden of proof cannot be met by speculative assertions of bias or prejudice." Triana v. United States, 205 F.3d at 41.

As for the prejudice prong, because, among other things, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests," Strickland v. Washington, 466 U.S. at 692, 104 S. Ct. at 2067, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief," Cuyler v. Sullivan, 446 U.S. at 349-50, 100 S. Ct. at 1719; accord, e.g., Mickens v. Taylor, 122 S. Ct. at 1244 ("prejudice will be presumed only if the conflict has significantly affected

counsel's performance--thereby rendering the verdict unreliable, even though Strickland prejudice cannot be shown"); Burger v. Kemp, 483 U.S. at 783, 107 S. Ct. at 3120.[69/]

To date, the Supreme Court only has applied this presumption of prejudice to cases involving attorneys who concurrently represented clients with conflicting interests – so-called "multiple concurrent representation." Mickens v. Taylor, 122 S. Ct. at 1245-46 ("In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the Sullivan prophylaxis in cases of successive representation. Whether Sullivan should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.").[70/]

[69/] See also e.g., Cuyler v. Sullivan, 446 U.S. at 349-50, 100 S. Ct. at 1719 ("Once the Court concluded that [an attorney] had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of the 'right to have the effective assistance of counsel.'") (quoting Glasser v. United States, 315 U.S. 60, 76, 62 S. Ct. 457, 467 (1942)); United States v. Schwarz, 283 F.3d at 91 ("While a defendant is generally required to demonstrate prejudice to prevail on a [Strickland] claim of ineffective assistance of counsel, this is not so when counsel is burdened by an actual conflict of interest. Prejudice is presumed under such circumstances. Thus, a defendant claiming he was denied his right to conflict free counsel based on an actual conflict need not establish a reasonable probability that, but for the conflict or a deficiency in counsel's performance caused by the conflict, the outcome of the trial would have been different. Rather, he need only establish (1) an actual conflict of interest that (2) adversely affected his counsel's performance.") (citations omitted); Lopez v. Scully, 58 F.3d at 43 ("Harmless error analysis is inappropriate in this context. Once a petitioner has shown that an actual conflict of interest adversely affected defense counsel's performance, prejudice to the petitioner is presumed and no further showing is necessary for reversal. . . . Because prejudice is presumed, the violation of [petitioner's] Sixth Amendment rights cannot be harmless.").

[70/] The Supreme Court further explained: "Both Sullivan itself, and Holloway, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. Not all attorney conflicts present comparable difficulties." Mickens v. Taylor, 122 S. Ct. at 1245 (citations omitted).

B. Stewart Was Not Subject to an Actual Conflict of Interest that Adversely Affected Her Performance

Prior to Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002), courts consistently split the Sullivan deficiency prong into two elements: (1) actual conflict, and (2) adverse effect on performance. Under this prior precedent, a defendant was required (1) first to prove an actual conflict, and (2) then to prove that the conflict adversely affected the attorney's performance, i.e., that "a 'lapse in representation'" resulted from the conflict. See, e.g., United States v. Schwarz, 283 F.3d 76, 91-92 (2d Cir. 2002). Although Mickens effectively conflated the two elements, Mickens v. Taylor, 122 S. Ct. at 1244 n.5 ("An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."), this Court will analyze the two elements separately for conceptual clarity. E.g., Williams v. United States, No. 02-2198, 2002 WL 21182101 at *2 (2d Cir. May 20, 2003) ("To prevail on an 'actual conflict' claim, a defendant must first show that an actual conflict existed, then demonstrate that this conflict adversely affected counsel's performance.").

To aid in analyzing the conflict issue, it is important to understand the relatively unique circumstances of defense counsel Stewart's criminal problems. Stewart was charged with criminal contempt for refusing to disclose to a grand jury her fee arrangements and retainer agreements with a client being investigated as a member of a major narcotics operation. See People v. Stewart, 158 Misc. 2d 776, 777-78, 601 N.Y.S.2d 983, 984 (Sup. Ct. N.Y. Co. 1993). The state courts denied Stewart's motion to quash, and when she was re-called to the grand jury in 1991, she still refused to testify. Id. In May 1993, however, Justice Andrias dismissed the contempt charges against Stewart on policy grounds. Id. at 786-87, 601 N.Y.S.2d at 989. Thus, at the time of

Skinner's trial in early 1997, the charges against Stewart had been dismissed, although the State had appealed the dismissal.[71] On April 8, 1997 – more than two months after Skinner's trial ended – the First Department reversed Justice Andrias and reinstated the criminal contempt charges against Stewart. People v. Stewart, 230 A.D.2d 116, 656 N.Y.S.2d 210 (1st Dep't 1997). The New York Court of Appeals initially granted leave to appeal, People v. Stewart, 90 N.Y.2d 867, 661 N.Y.S.2d 194 (1997), but in February 1998 dismissed the appeal because of a "threshold jurisdictional impediment" (because the First Department's decision was based on facts not law). People v. Stewart, 91 N.Y.2d 900, 902, 668 N.Y.S.2d 1000, 1000 (1998). Thereafter, in March 1999, Stewart pleaded guilty to a misdemeanor and was given an unconditional discharge.[72]

1. Skinner Has Not Shown That The State's Appeal of Stewart's Dismissed Indictment Created an Actual Conflict of Interest

The Second Circuit has held when a defendant and his lawyer are simultaneously prosecuted by the same office, "[t]he interests of lawyer and client may . . . diverge[] with respect to their dealing with that office," which may "present a plausible claim that his lawyer had an actual conflict of interest." Armienti v. United States, 234 F.3d 820, 824-25 (2d Cir. 2000).[73] Prosecution or investigation by the same office, standing alone, however, is not grounds for finding an actual

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[71] The First Department heard oral arguments in Stewart's case in May 1995. See Matthew Goldstein, Appeal on Forced Disclosure of Fee Terms is Still Pending, N.Y.L.J., Mar. 20, 1997.

[72] See Daniel Wise, Stewart Quits Contempt Fight to Save Career, N.Y.L.J., Mar. 29, 1999.

[73] In Beatty v. United States, 142 F. Supp. 2d 454, 459 (S.D.N.Y. 2001), the court stated that "[t]o rise to the level of an actual conflict . . . the agency or office prosecuting the attorney must be the same as the agency or office prosecuting the defendant," citing, inter alia, Armienti. Armienti makes clear, however, that while the same prosecuting agency is necessary to find a conflict, it alone is not sufficient to demonstrate an actual conflict.

conflict. See, e.g., United States v. Armienti, 313 F.3d 807, 814 (2d Cir. 2002) (Second Circuit rejected defendant's argument that counsel's prosecution by the same U.S. Attorney's office created an actual conflict, rejecting defendant's attempt to liken his case to United States v. Levy, 25 F.3d 146, 150, 156 (2d Cir. 1994), in which the Second Circuit "found that the fact that Levy's attorney was being prosecuted on unrelated criminal charges by the same office prosecuting Levy was one of the factors that contributed to an actual conflict between Levy and his counsel. . . . None of [the] additional factors relied upon in Levy are present in this case," since Levy's counsel represented both co-defendants, had privileged information from co-defendant relevant to Levy's defense, counsel could have been called as a trial witness, and the attorney may have been involved in co-defendant's flight.).

Although Stewart's contempt charge was brought by the same District Attorney's Office that was prosecuting Skinner, Stewart did not have an actual conflict of interest during her representation of Skinner. First, Stewart was not under indictment during her representation of Skinner; Stewart's indictment was dismissed on May 18, 1993, almost three years before Skinner was arrested on January 31, 1996. (See pages 2 and 91above.) Second, the charges against Stewart – criminal contempt for refusing to disclose fee and retainer information about a client – were entirely unrelated to the assault, weapons and witness tampering charges that Skinner was facing. Compare, e.g., Moss v. United States, 323 F.3d 445, 472 (6th Cir. 2003) ("It is well-established that a conflict of interest may arise where defense counsel is subject to a criminal investigation. . . . In order to establish a conflict of interest, however, the alleging party must demonstrate a nexus between the crimes of the client and the attorney."), with United States v. Fulton, 5 F.3d 605, 609-12 (2d Cir.

1993) (actual conflict existed where defendant alleged that counsel was engaged in the heroin trafficking with which he was charged). Third, the dismissed charges against Stewart are not the sort of charges for which Stewart would want or need to curry favor with the District Attorney's Office. If Stewart were interested in currying favor with the District Attorney's Office, she could have provided the fee information sought rather than refusing to testify before the grand jury. Stewart's willingness to face criminal contempt charges in order to protect her views as to the sanctity of the attorney-client relationship belies any theory that she would sacrifice Skinner's interests for her own. The nature of the charges against Stewart and her reputation for aggressive advocacy for criminal defendants[74/] refute any allegation that she was operating under a fear of retaliation from the District

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74/ When dismissing the indictment in 1993, the Supreme Court noted Stewart's reputation as a vigorous advocate. People v. Stewart, 601 N.Y.S.2d 983, 988-89 (N.Y. Sup. Ct. 1993) ("There is nothing in the extensive papers before this Court to reflect anything but an advocate totally dedicated to the rule of law and to advancing the principle of justice for all. . . . The point is not whether the People or Ms. Stewart is correct but whether Ms. Stewart took a principled position that a vigorous advocate has every right to advance. . . . [T]he public's welfare is safeguarded as much by fair dealing and vigorous advocacy as it is by aggressive enforcement of a particular law, even one as important as contempt.") The criminal defense bar also lauded Stewart's willingness to resist the grand jury subpoena. See Daniel Wise, Stewart Quits Contempt Fight to Save Career, N.Y.L.J., Mar. 29, 1999 (A past president of the National Association of Criminal Defense Lawyers "agreed that Ms. Stewart, in taking a principled stand in defense of the sanctity of the attorney-client privilege, had made an 'important contribution' in 'sensitizing' federal and state prosecutors to the dangers posed by subpoenas aimed at lawyers." The then-president of the New York Criminal Bar Association "said that the group would vigorously defend Ms. Stewart [because] '[t]o the extent she broke the law, she did so with the very best of intentions." The then-president elect of the New York Association of Criminal Defense Lawyers reported "'a strong likelihood that [the] group will play a highly active role in Ms. Stewart's defense because she had been motivated by a very real concern for the attorney-client relationship.'").

Of course, Stewart's most recent legal problems have raised serious issues as to whether she has taken vigorous client advocacy too far. See Mark Hamblett, Attorney Charged With Aiding Terrorists: Defense Lawyer Accused of Helping Imprisoned Client Contact Islamic

(continued...)

Attorney's Office or wanted to curry favor with the office.[75/] See, e.g., United States v. Peterson, 233 F. Supp. 2d 475, 489 (E.D.N.Y. 2002) (where counsel was sentenced almost a month before the government's investigation of defendant began, counsel "had no reason to curry favor with the government during the pendency of the defendant's case for fear that the government may prosecute him more vigorously."); see also, e.g., Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992) (Investigation of criminal defendant's lawyer "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer . . . [T]he defense lawyer may fear [such retaliation], at least to the extent of tempering the zeal of his defense of his client somewhat. Yet presumably the fear would have to be shown before a conflict of interest could be thought to exist.").[76/]

[74/] (...continued)
Group, N.Y.L.J., Apr. 10, 2002; Benjamin Weiser & Robert F. Worth, Indictment Says Lawyer Helped a Terror Group, N.Y. Times, Apr. 10, 2002.

[75/] According to the New York Law Journal article reporting Stewart's guilty plea:

> Once [the presiding judge] ruled . . . that she could not defend the contempt charges by arguing she was protecting the attorney-client relationship, Ms. Stewart explained, the case against her was "pretty much open-and-shut." Alluding to the likelihood that she would have automatically lost her license, she said, "too many people depend upon me, for me to put my head down and let them cut it off."

Stewart also stated that "in resisting the subpoena she had 'energized a lot of people.' and that as a result 'prosecutors have not been issuing subpoenas to lawyers on a regular basis.'" Daniel Wise, Stewart Quits Contempt Fight to Save Career, N.Y.L.J. Mar. 29, 1999.

[76/] Compare, e.g., United States v. Levy, 25 F.3d at 150, 156 (counsel's prosecution on unrelated criminal charges by the same office prosecuting defendant was one of several conflict grounds because while awaiting sentence, counsel "may have believed he had an interest in (continued...)

The Court finds that on the unique facts of this case – a vigorous defense attorney charged with contempt for trying to protect client confidences, and the charges she was facing were dismissed (albeit still on appeal) during Skinner's trial – Skinner has failed to demonstrate that the pending appeal of Stewart's dismissed indictment created an actual conflict of interest.[77/]

[76/] (...continued)
tempering his defense of [defendant] in order to curry favor with the prosecution, perhaps fearing that a spirited defense of [defendant] would prompt the Government to pursue the case against [counsel] with greater vigor."); United States v. DeFalco, 644 F.2d 132, 136-37 & n.5 (3d Cir. 1979) (conflict found where facts presented "not a case of mere indictment of a lawyer; [but rather] indictment plus plea bargaining plus entry of a plea of guilty" where lawyer was prosecuted by, and plea bargained with, same United States Attorney's Office that prosecuted his clients and lawyer entered into bargaining while client's appeal was pending).

[77/] The Court has found only one other case where a former client of Stewart's claimed that her contempt charge caused a conflict of interest: Beatty v. United States, 142 F. Supp. 2d 454, 456 (S.D.N.Y. Apr. 17, 2001). Beatty was represented at trial by Stewart and convicted on January 17, 1997. Requesting the appointment of new counsel to represent him at sentencing, Beatty argued that Stewart's case, pending on appeal before the First Department, "created a conflict that in turn caused Stewart to make unsound strategic decisions during [Beatty's] trial." 142 F. Supp. 2d at 457. First, the court found no per se conflict because the court "first learned of the alleged conflict at a post-trial hearing and then fully considered the issue [and because] there is nothing before the Court suggesting that Stewart was not authorized to practice law or that she was implicated in the crime for which Beatty was being charged." 142 F. Supp. 2d at 458-59. Second, rejecting Beatty's argument that "Stewart had an interest in cooperating with the prosecution because of the contempt charges against her," the court found that no actual conflict was established because Beatty and Stewart were not being prosecuted by the same offices or agencies. 142 F. Supp. 2d at 459. The court further found that Stewart was not ineffective under Strickland, as she was "diligent and well prepared" and her "performance most certainly did not fall below an objectively unreasonable level." 142 F. Supp. 2d at 459.

2. Even Assuming Arguendo That Stewart Had An Actual Conflict, The Pending Appeal of Stewart's Dismissed Indictment Did Not Adversely Affect Her Representation of Skinner

a. The Adverse Effect Standard[78/]

Assuming arguendo that Stewart had a conflict, Skinner also would have to show by a preponderance of the evidence that "'a conflict of interest actually affected the adequacy of his representation.'" Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1242-43 (2002) (petitioner must establish that the conflict "affected the counsel's performance, as opposed to a mere theoretical division of loyalties"); see also Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719 (1980) ("[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."). The Supreme Court has explained, in general terms, that the conflict must have an "adverse" and "significant[]" effect, Mickens v. Taylor, 122 S. Ct. at 1244 n.5, 1245, but has not described the precise contours of the "lapse in representation," Cuyler v. Sullivan, 446 U.S. at 349, 100 S. Ct. at 1719; see, e.g., Burger v. Kemp, 483 U.S. 776, 785, 107 S. Ct. 3114, 3121 (1987) (rejecting claim of actual conflict of interest because, inter alia, any conflict "did not harm [the allegedly conflicted] lawyer's advocacy").

To fill this gap, the Second Circuit adopted a test followed by both the First and Third Circuits:

> [I]n order to prove adverse effect on the basis of what an attorney failed to do,

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78/ For an additional decision authored by this Judge discussing the adverse effect standard in conflict cases in language substantially similar to that in this entire section of this Report & Recommendation, see Quinones v. Miller, 01 Civ. 10752, 2003 WL 21276429 at *33-35 (S.D.N.Y. June 3, 2003) (Peck, M.J.).

> "[a defendant first] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993) (quoting United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988) (quoting United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985)), cert. denied, 492 U.S. 906, 109 S. Ct. 3215 (1989)), cert. denied, 511 U.S. 1022, 114 S. Ct. 1407 (1994); accord, e.g., United States v. Schwarz, 283 F.3d 76, 92 (2d Cir. 2002); Amiel v. United States, 209 F.3d 195, 199 (2d Cir. 2000); Triana v. United States, 205 F.3d 36, 40-41 (2d Cir. 2000). Based on this two-element test, the Second Circuit has held that once a petitioner demonstrates an actual conflict, he:

> is not required to show that the lapse in representation affected the outcome of the trial or that, but for the conflict, counsel's conduct of the trial would have been different. [United States v.] Malpiedi, 62 F.3d [465,] 469 [(2d Cir. 1995)]. The forgone strategy or tactic is not even subject to a requirement of reasonableness. Id. As we have previously recognized,
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> > [t]he test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice.

United States v. Schwarz, 283 F.3d at 92.[79/]

[79/] Accord, e.g., Hess v. Mazurkiewicz, 135 F.3d 905, 910 (3d Cir. 1998) (Petitioner "must identify a plausible defense strategy that could have been pursued, and show that this alternative strategy inherently conflicted with, or was rejected due to, [counsel's] other loyalties or interests. . . . Significantly, [petitioner] need not show that the lapse in representation was so egregious as to violate objective standards for attorney performance. See [United States v. Gambino, 864 F.2d 1064, 1070 (3d Cir. 1988)] (noting that accused may establish a lapse in representation merely by showing counsel rejected a defense that 'possessed sufficient substance to be a viable alternative').").

Other circuits have held, to the contrary, that in order to prove an adverse effect, petitioner must show that the foregone strategy was "objectively reasonable." See Mickens v. Taylor, 240 F.3d 348, 361 (4th Cir. 2001) (en banc), aff'd, 535 U.S. 162, 122 S. Ct. 1237 (2002); Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.) (en banc), cert. denied, 528 U.S. 817, 120 S. Ct. 57 (1999). As the en banc Eleventh Circuit held:

> First, [petitioner] must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

Freund v. Butterworth, 165 F.3d at 860 (quoting Freund v. Butterworth, 117 F.3d 1543, 1579-80 (11th Cir. 1997)) (emphasis added & citations omitted).[80/]

[80/] The Fourth Circuit, en banc, offered a similar formulation:

> First, the petitioner must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the petitioner must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. . . . [T]he petitioner must show that the alternative strategy or tactic was "clearly suggested by the circumstances." . . . Finally, the petitioner must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Mickens v. Taylor, 240 F.3d at 361 (emphasis added). A panel of the Eight Circuit followed a similar path, albeit not as well-defined. See Caban v. United States, 281 F.3d 778, 786 (8th Cir. 2002) ("if a reasonable attorney would have adopted the same trial strategy absent a conflict, [petitioner] cannot show [his attorney's] performance was adversely affected by that conflict" under Cuyler v. Sullivan standard).

Certain circuit court decisions seem to apply the Strickland standard of deferring to counsel's (continued...)

Thus, there is no Supreme Court precedent, but a split in Circuit authority, regarding the appropriate conflict of interest standard. Under AEDPA, however, the question is whether the state court's decision unreasonably applied Supreme Court precedent; "[a] petitioner cannot win habeas relief solely by demonstrating that the state court unreasonably applied Second Circuit precedent." Yung v. Walker, 296 F.3d 129, 135 (2d Cir. 2002). Given that the Supreme Court has not spoken on whether or not the plausible alternative strategy need be "reasonable," and the circuits are divided, this Court cannot say that the Second Circuit's holding that a petitioner need not prove

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80/ (...continued)
"trial strategy" rather than applying Sullivan's "adverse effect" standard. See United States v. Mays, 77 F.3d 906, 909 (6th Cir. 1996) ("[D]efendant must show not only a conflict but also that the conflict caused the attorney to make bad choices for his client. In fact, the incidents referred to in defendant's brief of arguably unwise questions by defense counsel of prosecution witnesses appear to have been part of a losing strategy but they were not the result of choices made where there were clearly better alternatives. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) ('Judicial scrutiny of counsel's performance must be highly deferential')."); United States v. Kindle, 925 F.2d 272, 275-76 (8th Cir. 1991) ("[T]he defendant must . . . 'demonstrate an actual conflict of interest which adversely affected his attorney's performance' to obtain relief. . . . The limited record is simply inadequate for us to conclude that there was an actual conflict of interest and clear prejudice to appellant. The alleged omissions by defense counsel are not enough in the context of the record to constitute clear evidence of a conflict of interest and prejudice. Such decisions could have been defense strategy, and we give great deference to counsel's determinations within that realm."). Deference to "trial strategy" in the context of a conflict of interest review seems plainly contrary to Supreme Court precedent, as it would eviscerate the less deferential standard announced by the Supreme Court in Cuyler v. Sullivan and its progeny. The standard announced in Sullivan was meant to be different from Strickland. Deferring to trial strategy would render the first prong of Sullivan no different from Strickland (although Sullivan's presumption of prejudice would still remain in the second prong).

that a foregone strategy was "reasonable" represents "clearly established" Supreme Court precedent under AEDPA.[81/]

In any event, under either the Second or Eleventh Circuit standard, Skinner has not shown some plausible defense strategy or tactic that Stewart might have, but did not, pursue.

b. Skinner Has Not Shown, and the Court Cannot Find, Any Adverse Effect on Stewart's Representation Related to the Alleged Conflict

Skinner has not alleged any deficiency in Stewart's performance caused by the possibility that her dismissed indictment would be reinstated on appeal. Even assuming arguendo the pending appeal created an actual conflict, none of Skinner's challenges to her representation – specifically, failure to call certain witnesses, to file certain motions, and to appear at his indictment[82/]

81/ See James v. Herbert, No. 02-2389, 57 Fed. Appx. 894, 896, 2003 WL 328803 at *2 (2d Cir. Feb. 13, 2003) (where Supreme Court had not spoken on a particular counsel conflict issue, and at least one other circuit court disagreed with the Second Circuit's position on the issue, the Second Circuit could not say that the state court's contrary decision "'unreasonably failed to extend a clearly established, Supreme Court defined, legal principle to [a] situation[ ] which that principle should have, in reason, governed'"); Hines v. Miller, 318 F.3d 157, 164 (2d Cir.) ("Given the many divergent approaches and outcomes in federal courts that have applied clearly established Supreme Court precedent to the facts at issue and the absence of any Supreme Court decision concerning this type of [ineffective assistance] claim, we find no basis for concluding--as the dissent does--that the Appellate Division's decision here constituted an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."), cert. denied, No. 02-9637, 2003 WL 1609428 (May 15, 2003); DelValle v. Armstrong, 306 F.3d 1197, 1200 (2d Cir. 2002).

82/ Skinner's other allegation, that Stewart allegedly "developed an open door relationship with the Homicide Investigations Unit" and prosecutors (Dkt. No. 19: Traverse at 32), is attributed by Skinner not to Stewart's criminal charges but to the fact that one of Stewart's other clients was a cooperator (id.). If representing a cooperator created a conflict, few if any criminal defense attorneys could be considered conflict free. Moreover, Skinner has not articulated how Stewart's alleged relationship to the Homicide Investigation Unit as a result of representing a cooperator adversely affected Stewart's representation of Skinner.

– would have been caused by a desire to curry favor with the prosecutor or by a fear that vigorously representing Skinner would harm Stewart's own case. Indeed, the Court has already found Skinner's assertions of Stewart's alleged ineffectiveness to be meritless. (See Point VI above.) See United States v. Blount, 291 F.3d 201, 211-12 (2d Cir. 2002) (no conflict found where a member of defendant's attorney's law firm had represented the government's witness in an unrelated matter, but, inter alia, defendant failed to show that the prior representation "had any effect" on defense counsel's performance), cert. denied, 123 S. Ct. 938 (2003); United States v. Salerno, 868 F.2d 524, 541 (2d Cir.) (claim that counsel's involvement in two Department of Justice investigations created conflict of interest denied where defendant "has not even attempted a showing of actual conflict of interest or in any way indicated what possible effect there may have been upon his lawyer's trial performance, or how these investigations were in any way related to the present case."), cert. denied, 491 U.S. 907, 109 S. Ct. 3192 (1989); Moseley v. Scully, 908 F. Supp. 1120, 1142 (E.D.N.Y. 1995) ("Even assuming, arguendo, that these [foregone] motions were plausible and likely to succeed, there is simply no evidence that they were 'inherently in conflict with or not undertaken due to [attorney's purported] other loyalties or interests.'"), aff'd, 104 F.3d 356 (2d Cir. 1996); see also, e.g., United States v. Bruce, 89 F.3d 886, 896 (D.C. Cir. 1996) (rejecting conflict of interest challenge where "the defendant has neither demonstrated, nor even suggested, a nexus between the alleged conflict and these examples of claimed ineffectiveness. If an attorney fails to make a legitimate argument because of the attorney's conflicting interest (for example, counsel fails to raise a misidentification defense because to do so might implicate himself or another client), then the Cuyler standard has been met. But if the attorney's alleged shortcoming is utterly unrelated to the conflict, the defendant

cannot make use of the Cuyler presumption of prejudice and must instead proceed under Strickland."); Buenoano v. Singletary, 74 F.3d 1078, 1087 (11th Cir.) (where petitioner offered "no evidence of an adverse effect" of publication rights contract on counsels' performance, "performance was not adversely affected by any conflict even if an actual conflict existed."), cert. denied, 519 U.S. 1012, 117 S. Ct. 520 (1996).

C. It is Not Reasonably Probable that any Conflict Prejudiced Skinner's Case

It is well-settled Supreme Court precedent that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 1719 (1980); accord, e.g., Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1245 (2002) ("prejudice will be presumed only if the conflict has significantly affected counsel's performance--thereby rendering the verdict unreliable, even though Strickland prejudice cannot be shown"). In its most recent decision on the issue of conflicts, however, the Supreme Court emphasized that it had never applied this presumption of prejudice outside the context of "multiple concurrent representation." Mickens v. Taylor, 122 S. Ct. at 1245.[83/]

[83/] Indeed, the Supreme Court cautioned that its decision should not be "misconstrued" as extending the Sullivan rule to conflicts involving successive representation:

> In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the Sullivan prophylaxis in cases of successive representation. Whether Sullivan should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

Id. at 1245-46. The Supreme Court seemed to distinguish successive representation cases on the ground that the Sullivan presumption of prejudice only applied where "'a defendant shows that his counsel actively represented conflicting interests.'" Id. at 1245 (quoting (continued...)

In light of Mickens, there is no "clearly established federal law, as determined by the Supreme Court of the United States" mandating reversal of a conviction on a mere showing of a conflict of interest involving an attorney's conflict because of his or her own legal problems. Accordingly, on habeas review, conflict claims involving counsel under indictment or investigation must satisfy the Strickland standard for proving prejudice, i.e., petitioner must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" Mickens v. Taylor, 122 S. Ct. at 1240 (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). See Montoya v. Lytle, No. 01-2318, 53 Fed. Appx. 496, 498, 2002 WL 31579759 at *2 (10th Cir. Nov. 20, 2002) (on habeas review, applying Strickland prejudice standard to conflict claim involving successive representation), cert. denied, No. 02-9835, 2003 WL 1825142 (May 19, 2003).[84/]

The Sixth Circuit dealt with a similar factual situation in Smith v. Hofbauer, 312 F.3d 809, 817 (6th Cir. 2003). Smith claimed that "'he was denied the effective assistance of counsel in

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[83/] (...continued)
Cuyler v. Sullivan, 446 U.S. at 350, 100 S. Ct. at 1719) (emphasis added in Mickens). The Sixth Circuit recently stated that "[i]n the wake of Mickens, no court has applied the Sullivan presumption to a case of successive representation." Moss v. United States, 323 F.3d 445, 460 (6th Cir. 2003) (collecting cases).

[84/] See also United States v. Young, 315 F.3d 911, 914-15 n.5 (8th Cir.) (Sullivan applies to cases of "multiple or serial" representation, while Strickland applies to all other conflicts), cert. denied, No. 02-9949, 2003 WL 1923315 (May 19, 2003); Beets v. Scott, 65 F.3d 1258, 1265-72 (5th Cir.) (Cuyler v. Sullivan standard should only apply to conflict of interest claims involving multiple representation: "Although the federal circuit courts have unblinkingly applied Cuyler's 'actual conflict' and 'adverse effect' standards to all kinds of alleged attorney ethical conflicts, a careful reading of the Supreme Court cases belies this expansiveness. Neither Cuyler nor its progeny strayed beyond the ethical problem of conflict representation." Court applies Strickland analysis to attorney self-interest conflict from media rights agreement.), cert. denied, 517 U.S. 1157, 116 S. Ct. 1547 (1995).

violation of his Sixth Amendment rights because his attorney was charged with a felony pending in the same county.'" Smith v. Hofbauer, 312 F.3d at 816. Applying the Cuyler v. Sullivan standard, the state court found no actual conflict of interest that adversely affected Smith's counsel's performance. Id. The district court denied Smith's habeas petition, also under Cuyler v. Sullivan, because Smith failed to demonstrate he was adversely effected by counsel's alleged conflict. 312 F.3d at 817. The Sixth Circuit affirmed the district court's decision, but its affirmance was specifically "based on the fact that Petitioner seeks relief on a basis not supported by clearly established federal law inasmuch as the Supreme Court has never applied Sullivan's lessened standard of proof to any conflict other than joint representation." Smith v. Hofbauer, 312 F.3d at 818 ("Because the question of whether . . . Sullivan's lessened standard of proof for a claim of ineffective assistance of counsel based upon an attorney's conflict of interest for anything other than joint representation remains an 'open question' in the jurisprudence of the Supreme Court, Mickens [v. Taylor], 122 S. Ct. at 1246, and in fact was an open question at the time Petitioner's case was heard, Petitioner's claim fails because it is not based upon clearly established Supreme Court precedent as mandated by AEDPA.").

Thus, the only clearly applicable Supreme Court precedent is the Strickland v. Washington standard, discussed in Point VI.A above. Applying Strickland to Skinner's claim, and assuming arguendo that Stewart had an actual conflict, there is no reasonable probability that any conflict of interest prejudiced the outcome of Skinner's case.[85/] First, as discussed above, none of

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[85/] While professional standards may have obligated Stewart to alert Skinner that the charges against her could be reinstated on appeal, any such breach is irrelevant to Skinner's Sixth Amendment claim. The Supreme Court has repeatedly held that "'breach of an ethical (continued...)

Skinner's specific complaints about Stewart's representation have any merit. Second, Stewart's representation of Skinner was vigorous and able. The Court has read the entire suppression hearing and has skimmed the trial transcripts, which reveal that Stewart was well-prepared and vigorously advocated for Skinner: she moved for suppression of Skinner's identifications and coat, presented an adequate alibi defense, ably cross-examined witnesses, called into question the credibility of the State's witnesses, and presented a compelling summation. E.g., Rosario v. Bennett, 01 Civ. 7142, 2002 WL 31852827 at *33 (S.D.N.Y. Dec. 20, 2002) (Peck, M.J.) (denying claim that counsel failed to prepare adequately, in light of court's review of counsel's adequate trial performance); Cromwell v. Keane, 98 Civ. 0013, 2002 WL 929536 at *20 (S.D.N.Y. May 8, 2002) (Peck, M.J.) (same); see, e.g., Washington v. United States, No. 00-CV-761, 2002 WL 32074710 at *8 (W.D. Va. Apr. 1, 2002) (even assuming conflict existed, strategies that counsel allegedly failed to pursue, such as "failure to move to dismiss the indictment, interview witnesses, submit a justification defense, recall [particular witness] or seel a [particular] jury instruction" were not linked to the actual conflict and "would only be due to general deficient performance, rather than an attempt to curry favor or a failure to cooperate [with prosecutor]".), aff'd, No. 02-6744, 46 Fed. Appx. 705, 2002 WL 31116146 (4th Cir. Sept. 25, 2002), cert. denied, 123 S. Ct. 1605 (2003); United States v. Novaton, 271 F.3d

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[85/] (...continued)
standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.'" Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 1246 (2002) (quoting Nix v. Whiteside, 475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986)); accord, e.g., United States v. Taylor, 139 F.3d 924, 930 (D.C. Cir. 1998) ("An ethical lapse is not the same as a conflict of interest . . . ."); United States v. Gallegos, 39 F.3d 276, 278 (10th Cir. 1994) ("our inquiry is not whether a state disciplinary rule for lawyers has been violated . . . , but whether, everything considered, Appellant's counsel 'actively' represented conflicting interests").

968, 1009, 1012 (11th Cir. 2001) (Even assuming actual conflict based on counsel's investigation by same United States Attorney's Office in connection with a different case, defendant "made absolutely no showing of any adverse effect resulting from his attorney's alleged conflict" and record was "replete with examples of vigorous and relentless attacks" on the government's case by counsel. Counsel's "aggressive approach could hardly be seen as an effective way for an attorney to curry favor with the government.") (internal quotations omitted), cert. denied, 535 U.S. 1120, 122 S. Ct. 2345 (2002); United States v. Seguame, No. 94-50157, 50 F.3d 18 (table), 1995 WL 115559 at *5 (9th Cir. Mar. 16, 1995) (defendant's claim that the threat of contempt charges created conflict of interest failed where "there is no indication of any adverse effect on [counsel's] performance" and record reflected that counsel "made numerous objections, conducted significant cross-examination, and presented a viable defense case-in-chief."), cert. denied, 515 U.S. 1149, 115 S. Ct. 2594 (1995).[86/]

[86/] See also, e.g., Jeremiah v. Artuz, 181 F. Supp. 2d 194, 203 (E.D.N.Y. 2002) (examining "counsel's overall performance" and finding no ineffective assistance where "[t]rial counsel ably presented petitioner's justification defense throughout the trial and attempted in cross-examination to develop grounds for questioning the testimony of prosecution witnesses that was harmful to petitioner's defense. Counsel also helped elicit petitioner's trial testimony in an intelligible fashion. His summation was an organized and coherent presentation of the defense position which focused on the justification defense. Notwithstanding the apparent strength of the prosecution's case, counsel forcefully urged the jury to find a reasonable doubt based on an evaluation of the evidence and gaps in the evidence. . . . [E]ven assuming that counsel committed an oversight or error in judgment . . . petitioner was not deprived of his right to the effective assistance of counsel . . . . "); Walker v. McGinnis, 99 Civ. 3490, 2000 WL 298916 at *7 (S.D.N.Y. Mar. 21, 2000) ("[A] thorough review of the trial transcript reveals that [petitioner]'s counsel was, in fact, competent, tenacious, and thorough throughout the proceeding."); Harris v. Hollins, 95 Civ. 4376, 1997 WL 633440 at *6 (S.D.N.Y. Oct. 14, 1997) ("Petitioner offers a laundry list of alleged errors made by defense counsel during trial, which he claims denied him his constitutional right to effective assistance of counsel. . . . Taken in its totality, petitioner's claim must fail because he has not (continued...)

For all these reasons, Skinner's conflict of interest ineffective assistance of counsel claim should be denied.

CONCLUSION

For the reasons set forth above, Skinner's habeas claims should be denied. A certificate of appealability should not be issued on any of Skinner's claims. Although there is a lack of clarity as to the legal standard applicable to conflict of interest ineffective assistance of counsel claims, Skinner cannot prevail on his conflict claim no matter the standard, so a certificate of appealability should not issue even on that claim.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Deborah A. Batts, 500 Pearl Street, Room 2510, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Batts. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474

86/ (...continued)
demonstrated that counsel's conduct fell below that of a reasonable attorney, or that the jury would have found him not guilty but for counsel's ineffective performance. The record indicates that defense counsel aggressively pursued pretrial motions . . . cross-examined witnesses, made objections and motions, and gave a comprehensive summation that tied together defense strategies in an effort to discredit the State's case."); White v. Keane, 90 Civ. 1214, 1991 WL 102505 at *6 (S.D.N.Y. June 6, 1991), aff'd, 969 F.2d 1381 (2d Cir. 1992); Sanchez v. Kuhlman, 83 Civ. 4758, 1984 WL 795 at *4 (S.D.N.Y. Aug. 23, 1984) ("Careful review of the entire transcript demonstrates that petitioner's trial counsel was both zealous and competent.").

U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: New York, New York
June 17, 2003

Respectfully submitted,

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Andrew J. Peck
United States Magistrate Judge

Copies to: Rodney Skinner
Beth J. Thomas, Esq.
Judge Deborah A. Batts